JUDGMENTS.

IMPORTANT

JUDGMENTS

DELIVERED IN THE

COMPENSATION COURT AND NATIVE LAND COURT.

1866-1879.

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COMPENSATION COURT.

NATIVE LAND COURT.

PREFACE.

In consequence of applications made from time to time for copies of Judgments delivered in the Compensation Court and Native Land Court, it has been thought advisable to print all the more important of these in a collective form, so as to be easily accessible by persons requiring such, and also as a record of some of the most interesting events in Native history. In delivering judgment upon titles to Native land, it has frequently been found necessary to take a short retrospective view of the history of the particular tribe in question, inasmuch as Native title is founded either upon long-continued occupation from ancestral times, or upon conquest. Many of these Judgments will therefore be found to contain interesting records of Native history for a period of 200 years preceding the present time, and will prove of great assistance to any one who may hereafter compile a complete history of the Maori race.

NATIVE LAND COURT OFFICE.

AUCKLAND, SEPTEMBER, 1879.

COMPENSATION COURT.

NEW PLYMOUTH, June, 1866.

F. D. FENTON, ESQ., *Chief Judge.* HENRY A. H. MONRO, ESQ., *Judge.*

The application of JOHN LEWTHWAITE, *for compensation for loss of his interest in the Waitara Block, taken under The New Zealand Settlements Act,* 1863, *by Proclamation dated January* 31*st,* 1865.

THE claim of this gentleman is as follows :—

"1. That early in the year 1841 I purchased several sections of land from the Plymouth Company of New Zealand, and amongst them there were four sections of land in the Waitara district, numbered respectively on the surveyor's plan 434, 432, 451, and 360, each containing 50 acres, together with two sections situated in the Mangoraka district, also containing 50 acres each.

"2. That in March of the same year I left England for the purpose of selecting and occupying the said sections of land.

"3. That early in 1842 I selected the said sections and held quiet possession of the same until Captain Fitzroy, as Governor, paid a visit to New Plymouth, ignored the award of Mr. Commissioner Spain, and gave notice to all who held lands in the aforesaid districts that they were trespassers upon the said lands.

"4. That not being able to make use of these lands, I left the colony for England in 1845.

"5. That in 1847 the New Zealand Company awarded compensation to the resident and absentee land owners who had been unable to possess their lands to that date.

"6. That on my return to the colony in 1854 the committee appointed to settle this compensation awarded me resident or preferential scrip to the amount of 75 acres for each allotment.

"7. That I still hold this scrip, never having had an opportunity of exercising it upon available land such as it purported to secure.

"8. That the Land Order or Scrip Act, 1858, purporting to deal equitably with these claims, omits to recognise this preferential scrip, and also to provide for claimants repossessing their original sections where no interference is made with any general scheme of land settlement.

"9. That in addition to the several sections to which I am entitled, I beg also to claim 1,000 acres as compensation for non-possession of my original sections to the present time, as the market value of each Waitara section being in 1842 £300, would now amount to £3,000, and that of each Mangoraka section being then value £200, would now amount to £2,000, or altogether £16,000.

"10. That having waited nearly twenty-five years for these lands, in the expectation of settling my family upon them permanently, I have the confidence to hope that I shall be awarded the full amount of my claim.

"JNO. LEWTHWAITE."

The circumstances of this case, admitted for the purpose of deciding the legal questions, are as follows:—

In 1841, the claimant purchased from the Plymouth Company of New Zealand, orders for, or contracts for, the purchase of sections of land in the settlement of New Plymouth. In 1842 he made his selections at Waitara and Mangoraka, and held quiet possession of his lots until he was ejected by Governor Fitzroy. Subsequently to this ejectment, the Plymouth Company of New Zealand became amalgamated with the New Zealand Company. In 1847, an Act was passed by the Imperial Parliament (X. and XI. Vict., cap. 112) by which the company was authorised upon the terms and in manner therein mentioned to relinquish their undertaking, and surrender to Her Majesty all their claims and title to land in the Colony; and on notice being given by the company of their intention to exercise the power thus conferred, all such lands were to become demesne lands of the Crown, subject, nevertheless, to any contract which should be then subsisting in regard to any of such lands. On the 4th of May, 1849, an agreement was entered into between the New Zealand Company, through Mr. Fox, their principal agent, and the holders of land orders, which contained the following terms, hereinafter called the terms of compromise:—

"To enable resident purchasers to select the land to be given for the compensation hereinafter mentioned, the company will, after providing for the existing claims of purchasers, offer for the purpose the land already at its disposal in this district, as well as such districts as may hereafter be purchased by the Government on its account in the settlement of New Plymouth, or in immediate connexion therewith.

"That resident purchasers shall be declared entitled to receive, as the maximum of compensation, 75 acres of land for every 50 acres of land purchased; the amount of such compensation in each case to be determined on its individual merits with reference to any circumstances which may distinguish it from any other purchases.

"That such of the resident purchasers as received land in exchange under the arrangement of Governor Fitzroy shall likewise be declared entitled to compensation; but, in assessing the amount thereof, regard shall be had to the amount of land already secured to them under that arrangement, and to any other circumstances which may distinguish these cases from those of the other purchasers.

"That for the purposes of this arrangement it is understood that the term 'resident purchaser' shall apply to all parties holders of land in New Plymouth, derivative as well as original, now actually *resident in the Colony of* New Zealand.

"That this arrangement shall extend to land purchasers, original and derivative, formerly resident but now absent from the Colony, whenever such purchasers shall return."

Subsequently the company gave notice that they were ready to surrender their charters to Her Majesty; whereupon, by virtue of the before-mentioned Act, all claim and title to the lands of the company ceased and determined; and all such lands became vested in Her Majesty as demesne lands of the Crown, subject, nevertheless, to any contracts which were then subsisting in regard to any of the said lands.

In 1851, an Ordinance was passed by the New Zealand Legislature called The New Zealand Company's Land Claimants Ordinance, which recited that in certain cases possession had not been given by the company of lands sold or contracted to be sold by them to the purchasers thereof, and the right of selection purporting to be conferred by such scrip as aforesaid in many cases still remained unexercised; and that it was essential that means should be taken for ascertaining what were the contracts of the company then subsisting in regard to the said lands, with a view to their satisfactory adjustment. This Ordinance then made provision for an investigation into, and report upon, such contracts, and ordained that the value of the land affected by any contract should be ascertained in manner therein provided, and it authorised the Governor to issue to any person found to have a rightful claim to any land or right therein scrip for the amount so ascertained, such scrip to be available in the acquisition of land in the manner set forth in the Ordinance.

The Constitution Act then followed, empowering the General Assembly to legislate for the Colony of New Zealand.

In 1854, in pursuance of the terms of compromise, there was awarded to the claimant by Commissioners appointed under the authority of the Ordinance, resident preferential scrip to the amount of 75 acres for each allotment of which he had been deprived.

In 1856, an Act was passed by the General Assembly called The Land Orders and Scrip Act, 1856, by which provision was made for defining and settling the right of holders of land orders and land scrip.

By The Land Orders and Scrip Act, 1858, this Act was repealed, and it was enacted that within the Province of New Plymouth every unexercised original land order issued by the Plymouth Company of New Zealand, or by the New Zealand Company, and conferring, or purporting to confer on the owner or holder thereof the right to select according to a fixed and definite order of choice 50 acres of land within the settlement of New Plymouth should entitle such owner or holder in priority to general purchasers, and according to the aforesaid order of choice, to select out of any land over which the native title then was or thereafter should be extinguished, and which *should be declared open for purchase* (except the Hua village site), *one acre of* town land or 37½ acres of suburban land or 75

acres of rural land, at the option of such owner or holder, and subject to certain conditions. And the ninth section prescribes the rate at which original land orders issued by the Plymouth Company or by the New Zealand Company, conferring the right to select land within the settlement of New Plymouth according to priority of application, or otherwise than in a fixed and definite order of choice, should be considered as equivalent in the purchase of waste lands of the Crown; and also the rate at which supplementary land order and compensation or land scrip issued by the New Zealand Company should be taken; and concludes by enacting that all such land orders and land scrip, whether original or supplementary, should not be otherwise available or exercisable for the purchase or selection of waste lands of the Crown.

The land orders and scrip in respect of which Mr. Lewthwaite now seeks compensation have not been exercised to the present time.

Upon these facts the claimant argues that either he is entitled to select land, by virtue of his orders, out of the blocks of land which have come into possession of the Crown under the operation of The New Zealand Settlements Acts; or, if such right does not exist, that he is entitled to compensation under the provisions of such Acts for the deprivation thereof.

The agent for the Crown refers to The Land Orders and Scrip Act, 1858, and argues that whatever the claimant's rights previously were, they have been dealt with and definitively provided for in that Act; and that if he has no rights under that Act which would come under the category of a title, interest or claim to any land taken under the New Zealand Settlements Act, 1863, he has no estate in land for the taking of which the Court can grant him compensation.

Mr. Lewthwaite, in reply, quotes an Act of the Imperial Parliament passed in 1865, entitled An Act to Remove Doubts as to Colonial Laws, which provides as follows:—

"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

And he argues:—(1.) That if The Land Orders and Scrip Act, or The New Zealand Settlements Act interferes with the rights stated to have been secured to him by the before-mentioned Imperial statute, under the operation of which the land of the company became vested in Her Majesty, subject to the contracts which affected them, these Acts are, *pro tanto*, void for repugnancy. *(2.)* And further, that it is not lawful to deprive compulsorily any *man of his land except by* an Act against the passing of which he

may have had an opportunity of being heard by himself, his counsel, agents, and witnesses, *i.e.* by a Private Act.

1. As to the question of repugnancy, we are of opinion that this Court is not competent to entertain it. Holding that opinion we must regard The Land Orders and Scrip Act, 1858, and The New Zealand Settlements Act, as containing the law upon which Mr. Lewthwaite's claim to compensation must be decided.

2. As to the question whether The New Zealand Settlements Act, 1863, was rightly passed as a Public Act, we also think that this Court is not competent to give any opinion. Public Bills and Private Bills, when passed into Acts by the Legislature, are of equal validity, and the force of none of them can be questioned in or by this Court. The Court is, moreover, aware that Acts conferring upon the Government power to take lands compulsorily for purposes of great public importance, are constantly passed by the Imperial Parliament as Public Acts, though the same privilege is not allowed to private individuals or corporations. The Battersea Park Act and numerous Ordnance Fortification Acts, might be cited as instances, if means of reference existed in New Plymouth.

The case will then divide itself into three heads: –

1. What is the exact character of Mr. Lewthwaite's rights under The Land Orders and Scrip Act, 1858?

2, Are these rights destroyed or injured by The New Zealand Settlements Acts?

3. Can compensation be ordered to him by this Court for such destruction or injury?

I. It appears to the Court that the consideration of Mr. Lewthwaite's claim may fitly commence with the terms of compromise entered into with him and numerous other persons similarly situated by the New Zealand Company on the 4th May, 1849.

Mr. Lewthwaite did not avail himself of the means of settlement afforded by this arrangement, and his orders remained still unexercised, when the General Assembly passed The Land Orders and Scrip Act, 1858. It is not clear that this Act does not very much enlarge Mr. Lewthwaite's power of selection as based upon the Imperial Statutes and his previous rights, for it might be argued that his power of selection as previously existing was confined to the lands which became *demesne lands of the Crown*, when the property of the company passed to Her Majesty, although the terms of compromise did extend his power to "districts that might thereafter be purchased"—from whom not being expressed.

The Act of 1858 clearly deals with this class of claims, on the supposition that lands in the several Provinces would from time to time be acquired by the Crown from the natives, free of all liabilities and incumbrances, which would be open for purchase in the manner provided by the ordinary land laws.

Mr. Lewthwaite is the holder of documents which confer upon him an *interest over* all the lands at the time of the passing of the

Act in the hands of the natives, contingent upon the native title therein being extinguished, and their being thrown open for sale in the usual manner. His documents do not invest him with any right, absolute or contingent, over any specific portion of land. His interest, therefore, is simply a power of selecting land under certain conditions from time to time as he shall think fit, and extends over the class of land described in the Act throughout the whole Province; but is not an interest in any particular piece of land, and cannot become such an interest until he has exercised his power, which he cannot do until the contingencies above-noticed have happened; and although one contingency has happened in a manner not contemplated, viz., the extinction of the native title, the other contingency has not happened, viz., the lands being declared open for purchase.

II. Are these rights destroyed or injured by The New Zealand Settlements Acts?

The New Zealand Settlements Act, 1863, provides that after the Governor in Council shall have constituted any portion of the Colony a District under the Act, and shall have reserved and taken any land within such District for the purposes of settlement, and shall have declared that such land is required for the purposes of the Act, and is subject to the provisions thereof, such land shall be deemed to be Crown land, freed and discharged from all title, interest, or claim of any person whomsoever.

The rights, therefore, which this claimant previously held under The Land Orders and Scrip Act, 1858, were perfectly and absolutely extinguished by this provision, so far as concerns the land included in the several Orders in Council, and whatever rights, if any, he now holds over such lands must be derived afresh from The New Zealand Settlements Act, 1863, or the Act of 1865 continuing and amending it. Do any such rights exist, or can they be conferred under either of these Acts?

It will be necessary to ascertain what directions the Acts give for the appropriation of the lands taken. After the taken lands shall have been cleared from all incumbrances created by the rights which loyal owners may have under sections 9 and 10 of the Amendment Act of 1865, the 16th section of the Act of 1863, and the 17th section of the Act of 1865, empower and direct the Governor to set apart towns, farms, and land for persons subject to certain conditions of military or police service, and after the performance of such conditions to make grants of their several allotments to the persons settled thereupon. The 17th section empowers the Governor in Council, after setting apart land for the above-mentioned military or police services, to cause towns to be surveyed and laid out, and also suburban and rural allotments; and the 18th section then provides that such town, suburban and rural lands, shall be let, sold, or occupied, and *disposed of* for such prices, *in such manner, and for such purposes*, upon such terms, and *subject to such regulations* as the Governor in Council should from *time to time prescribe* for that purpose; and the 19th section

provides that the money to arise from such sales and disposal should be disposed of as the General Assembly might direct, in or towards the repayment of the expenses of suppressing the insurrection, and the formation and colonisation of settlements, including *the payment of any compensation* which might be payable under the Act.

It appears, therefore, that it was the intention of the Legislature, at the time of the passing of The New Zealand Settlements Act, 1863, that part of the money to arise from the sale or disposal of confiscated lands (using the term "confiscated" in its vulgar sense) should be devoted to the liquidation of the orders of this Court made in favour of persons entitled to compensation in money, and possibly it might have been competent for the Governor in Council in exercise of the power conferred by the 18th section to have made regulations which would have enabled Mr. Lewthwaite to have exercised his land orders upon terms which might have been prescribed in the regulations. However this may be, the regulations which were made in 1865 in exercise of this power contained no provision rendering these land orders available.

The New Zealand Settlements Act Amendment Act, 1865, repealed the above-quoted 17th, 18th, and 19th clauses of the Act of 1863, and the provision made in lieu of the 17th and 18th sections is contained in the 16th clause of the Amendment Act, and is as follows:—

"The order and manner in which land shall be laid out for sale and sold under the provisions of the said Act shall be in the discretion of the Governor, who shall have power to cause such land or any part thereof to be laid out for sale, and sold from time to time in such manner, for such consideration, and in such allotments, whether town, suburban, or rural, or otherwise, as he shall think fit, and subject to such regulations as he shall, with the advice of his Executive Council from time to time prescribe in that behalf. Provided that no land shall be sold except for cash, nor at a less rate than ten shillings per acre."

We apprehend that the proviso to this clause would now prevent the Governor from making any regulations with reference to the disposal of surplus lands acquired under the Act of 1863, which would let in the exercise of these land orders; but whether such regulations could be made or not is a question of no moment, as it has not been made to appear to the Court that regulations of any sort have been made under this Act. It is, therefore, in the judgment of the Court, quite clear that there exists no provision which Mr. Lewthwaite can avail himself of for the exercise of his orders over any land within the confiscated blocks, and that, therefore, his rights — which were established by The Land Orders and Scrip Act, 1858—are entirely extinguished, and that the fair intention of that Act is completely defeated by the *Acts of 1863 and 1865*, so far as these blocks are concerned.

III. We come now to the question, Can compensation be ordered by this Court for such destruction of his rights?

The Act of 1863, section 5, enacts that compensation shall be granted to all persons who have any title, interest, or claim, to any land taken under the Act; and section 7 provides that such compensation shall be granted according to the nature of the title, interest, or claim of the person requiring compensation, and according to the value thereof. The Amendment Act of 1865 is more particular, and enacts that every claim for compensation under the Act of 1863 shall specify the name of the claimant, the interest in respect whereof the claim is made, and as nearly as may be *the extent and particulars of land* affected thereby, and the amount claimed as compensation; and further provides, in section 12, that every order of the Court shall be made in writing, and shall specify and be accompanied with such plans and particulars as shall be prescribed by regulations to be made by the Governor in Council.

There can, therefore, be no doubt whatever that the Legislature contemplated only the compensation of persons having titles, estates, or claims in land capable of specification and description, and of which plans might be made. Now, as we have already determined that Mr. Lewthwaite's claim does not refer to, and cannot be made to refer to, any specific piece of land, but is simply a power extending over a certain class of land in the whole Province, exercisable on the happening of certain contingencies, we are forced to the conclusion that he does not come within that class of persons to whom the Court is empowered to order compensation. If the whole of the land in the Province of Taranaki, held under the native title, had been taken by the Governor in exercise of the powers conferred upon him by The Settlements Acts, it is very possible that, as all the land over which the claimant's unexercised power extends, would then have been devoted by the Government to purposes which absolutely and for ever excluded the possibility of exercising his land orders, we should have considered ourselves authorised to recognise him as a person legitimately entitled to compensation. But this has not been done. It is true that all the choice lands of the province over which his power ran have been taken, and the rights which remain to him are of little value, extending for the most part over lands which have not yet been trodden by the foot of man: but the legal difficulty still remains, and the Court is reluctantly compelled to the conclusion that although Mr. Lewthwaite has strong equitable claims, he has no legal right, title, or interest, to any land which can be recognised by the Court, and that it has no power to afford him any relief. That Mr. Lewthwaite has suffered a wrong, and has been suffering a wrong, for nearly a quarter of a century, seems unquestionable: but he must resort to the justice of the legislature for a remedy.

COMPENSATION COURT.

NEW PLYMOUTH, June, 1866.

F. D. FENTON, ESQ., *Chief Judge;* JOHN ROGAN, ESQ., *Judge; and* HENRY A. H. MONRO, ESQ., *Judge. Crown Agent:* MR. ATKINSON.

OAKURA.

THE Oakura Block is part of the Middle Taranaki District, constituted a district under the New Zealand Settlements Act 1863, by a proclamation of January 30th, 1865, and it was set apart as a site for settlement, declared to be subject to the provisions of the Act, and to be reserved and taken for the purposes thereof, by Order in Council made on the same day.

The claims for compensation which have been referred to this Court by the Colonial Secretary are very numerous, and come from many distant parts of the Colony; but they may be collected into the following heads:—1, Chatham Islands; 2, Nelson and the Middle Island; 3, Wellington; 4, Waikanae and Otaki; 5, Auckland, Waikato, etc.; 6, the resident claims.

(1). The claims from the Chatham Islands amount to 158, and the facts of the case are as follows:—

Previously to the great Waikato invasion between 1820 and 1830, these Chatham Islanders formed part of the great tribe called Taranaki, and resided at Hauranga on this block. They fled south from fear of the Waikato arms, and, after various wanderings, finally took possession of and settled in the Chatham Islands. There they have continued to dwell up to the present time, one or more of them having returned to visit their relations, but none of them having re-occupied or having attempted to domicile themselves in their old possessions. Many of the original refugees have of course died, but the children of these persons, as well as the survivors of the original migration, urge claims to their ancestral possessions. The conclusion at which we have arrived, after our experience in the Compensation Court, and as members also of the Native Land Court, is that before the establishment of the British Government in 1840 the great rule which governed Maori rights to land was force—*i.e.*, that a tribe or association of persons held possession of a certain tract of country until expelled from it by superior power, and that on such expulsion, if the invaders settled upon the evacuated territory, it remained theirs until they in their turn had to yield it to others. It is even very doubtful whether the relation of persons to the land was, as a rule, what in the English sense of the term could be styled *ownership. Land,* with its places of strength, concealment, and

security, seems to have been regarded more as a means of maintaining and securing the men who occupied, than the men who occupied it as a means of defending and maintaining possession of the land; so much so, that voluntary migrations were not unfrequent, and we have met with cases in which whole tribes abandoned their ancestral territory and migrated to other parts of the country where the means of living were more plentiful, or where by an amicable amalgamation with other tribes they might hope for a more secure or comfortable existence. A case of this sort appears to have happened on this very block, to which a tribe voluntarily migrated from Kaipara, who merged themselves into the Taranaki tribe, of which they now form an integral part, and in which its members can no longer be distinguished.

We do not think that it can reasonably be maintained that the British Government came to this Colony to improve Maori titles, or to reinstate persons in possessions from which they had been expelled before 1840, or which they had voluntarily abandoned previously to that time. Having found it absolutely necessary to fix some point of time at which the titles, as far as this Court is concerned, must be regarded as settled, we have decided that that point of time must be the establishment of the British Government in 1840, and all persons who are proved to have been the actual owners or possessors of land at that time, must (with their successors) be regarded as the owners or possessors of those lands now, except in cases where changes of ownership or possession have subsequently taken place, with the consent, expressed or tacit, of the Government, or without its actual interference to prevent these changes.

Compelled by absolute necessity to lay down a rule for our guidance as to the time and circumstances when the ownership or title of expelled owners could rightly be regarded as having terminated, we can find no other rule to establish than the one now expressed, and we have endeavoured to adhere to it as a fixed rule for our enquiries under The New Zealand Settlements Acts, where the questions at issue are matters purely between the Crown and a portion of its Maori subjects. Of course the rule cannot be so strictly applied in the Native Lands Court, where the questions to be tried are rights between the Maoris *inter se*, but even in that Court the rule is adhered to, except in rare instances. If greater latitude is allowed, and the *date of ownership* is permitted to be variable, the confusion will be such as to render any solution of this great question, upon any principle of justice, perfectly hopeless. Thus, we know that there are claims preferred by the Otaki natives to Maungatautari and the whole of Waikato, from which countries they have long been expelled, and from which, at an earlier date, they themselves drove out other tribes. Again, Te Rauparaha's people claim Kawhia on similar grounds, and have sent in claims.

We find, then, that according to the evidence, that branch of *the Taranaki tribe which now* inhabits the Chatham Islands was *expelled from this part of* the colony by the Waikato tribes previ-

ously to the year 1830, and that since the establishment of the Government in 1840 none of these persons have returned to re-occupy the lands from which they were driven, and we therefore think that they have no title, interest, or claim to any land within this block, on account of which this Court can order compensation.

(2.) NELSON AND MIDDLE ISLAND CLAIMS.

These claims amount in number to 216, and the persons claiming belong to Ngamahanga tribe. Like the Chatham Islanders, those who survived the Waikato invasion fled South. After sojourning some time at Kapiti and elsewhere, they invaded the Middle Island. There they succeeded in establishing themselves, and took possession of territories, part of which they have alienated to the Crown, and part of which they still retain and occupy. Up to the present time, none of them have ever returned to occupy any portion of this block, with the exception of one person—Wi Ruka—and accordingly we disallow all the claims except his; and, as it has been proved in evidence that this claimant did return and re-unite himself with that portion of the tribe which has re-occupied the land since 1840, we admit his claim.

(3.) WELLINGTON CLAIMS.

The claims from persons now residing in Wellington number altogether 61. Like the preceding, these claimants or their parents fled South from the Waikato invasion, united themselves with Rauparaha, and conquered for themselves territory in the neighbourhood of Wellington, on portions of which they still reside, the greater part of it having been alienated by them to the Crown. None of this class of claimants have ever returned to re-occupy any portion of this block, and their claims are therefore disallowed.

(4.) WAIKANAE AND OTAKI.

This class of claimants amounts in number to 137. They also abandoned their possessions on this block, and fled South from the Waikato tribes, and, after sojourning some time at Kapiti and elsewhere, settled down at Waikanae and in its neighbourhood. None ever returned to repossess themselves of any portion of this block except Rawiri Motutere, who came back and cultivated the soil since 1840. We therefore admit his claim. We also admit the claim of Wi Tamihana Te Neke, who on the sale of the Tataraimaka Block to the Crown, came back and asserted his right to a portion of the payment. His right was admitted by the tribe, and it has not been proved to the Court that any protest or objection was made by the Agent for the Crown. As the Crown, therefore, has tacitly admitted his right, we do not feel that we can now exclude him on the ground of his never having re-occupied. One letter from Waikanae, purporting to be signed by 125 persons, asserting a title to "land from *Waitaha to Mokau*, and from Okurukuru to Nukumaru, and protest-

ing against the land being stolen (keia, translated "confiscated,') has been referred to us by the Colonial Secretary, and we reject it as in no way being a claim, nor even purporting to be so.

(5.) AUCKLAND, WAIKATO, ETC.

The claimants from the North are persons who were taken prisoners in war by the Waikato and Ngapuhi tribes, and are five in number. Great numbers of prisoners of war have returned to Taranaki since the establishment of the Government. With the tacit, if not with the expressed approval of the Government, they have rejoined their tribes, and taken possession of their ancestral lands. These persons now appear in the ranks of the Resident Claimants, and their rights have been admitted by the Government so completely that the Land Purchase Commissioners have purchased land from them, and required their signatures to deeds and conveyances. Their claims are therefore admitted; but those prisoners of war who did not return to occupy are, on the rule above laid down, excluded.

COMPENSATION COURT.

NEW PLYMOUTH, June, 1866.

F. D. FENTON, ESQ., *Senior Judge;* JOHN ROGAN, ESQ., *Judge; and* HENRY A. H. MONRO, ESQ., *Judge.*

The claims in the Waitara South Block of Absentee Natives.

IN the argument of the Crown Agent in opposition to these claims, three points were mainly relied upon :—

I. That the appointment of Mr. McLean, the Land Purchase Commissioner, has not been proved.

II. That Mr. McLean's conduct and decisions should not bind the Court.

III. That the Government is not bound by the acts or premises of its predecessors.

With reference to the first objection, that Mr. McLean's appointment has not been proved, nor has it been shown that his proceedings were authorised by the Government, the Court is of opinion that that officer's appointment must be held to be valid, and his acts duly authorised, no evidence having been furnished to the contrary. The maxim of law is, that all acts are presumed to have been rightly and regularly done. It is a maxim of the law to give effect to anything which appears to have been established for a considerable time, and to presume that what has been done has been done of right and not of wrong. Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is, "Omnia præsumuntur rite et solenniter esse acta, donec probetur in contrarium." Thus, a man acting in a public capacity will be presumed to have been properly appointed and duly authorised; and, as the Agent of the Crown, Mr. McLean's acts must be held to have been the acts of the Crown.

Nor do we see any force in the objection raised by the Crown Agent that what Mr. McLean did should form no precedent for the Court, inasmuch as he may have recognised this class of owners, not because they were legally or equitably entitled, but because the state of the country was such that he could not have effected a purchase if he had not recognised them. If our doctrine is correct that the true foundation of all Maori title is force, we see in the conduct of Mr. McLean simply an application of that principle. It was his *duty to purchase* from natives land to be thereafter used for

settlement and colonisation. It was necessary, therefore, that the Government should be able to give and guarantee peaceable possession and quiet enjoyment of the lands so purchased and sold to settlers, and, to enable that to be done, Mr. McLean found it necessary to satisfy the claims of these absentee proprietors. And there is no doubt that if the war had not taken place and the relations of parties had not changed, and Mr. McLean were now purchasing the block of land under investigation, he would feel himself compelled to extinguish the titles of these absentees, as he had done in previous cases. In fact it appears that this recognition actually occurred in the case of Ropoama Te One.

The other objection raised by the Crown Agent—that one Government is not bound by the acts of its predecessors—appears to the Court to be fallacious. This Court is not the Government, and in no way represents the Government, and is in fact constituted to decide between the Crown and a portion of its subjects. The previous acts of the Crown may now very fairly be used as evidence by adverse claimants. Moreover we doubt very much whether the doctrine expressed is a good doctrine, even in politics. Certainly in courts of law, as concerns matters of right affecting the Crown, it must be held to be a bad doctrine.

The Court, therefore, sees no reason for departing from the rule which was acted upon in the case of the Oakura block. We exclude from compensation all persons who, having been expelled by force from this block of land previously to the year 1840, have never re-occupied, excepting such of them as have been recognised as owners by the Government or its officers.

We find the block called Waitara South divided into two distinct portions, the Puketapu and the Waitara. The Puketapu portion of this block is part of a larger estate, comprising originally in addition the Bell Block, and all the land as far as the Waiwakaiho river, owned by a clearly defined set of people called the Puketapu. When the Bell Block and other portions of this estate were sold, absentee claimants were recognised by the Government as owners, and received portions of the purchase-money. We feel ourselves bound, then, to recognise the rights of these persons over the remaining portions of this estate now taken under the Settlements Acts.

Rawiri Watino will also be admitted, he having produced an undertaking, signed by Mr. McLean, that his claims at Waiongana should be recognised whenever that land was purchased; also, Riwai Te Ahu, for the reason stated below.

The only absentee person whom we find to have been distinctly recognised by the Government in the Waitara portion is Ropoama Te One. But, in addition, we sanction the claim of Riwai Te Ahu and Piri Kawau over this block, although they have never actually re-possessed themselves of any portion of the land since the expulsion of the tribe by the Waikatos. We think this exception may justly be made, because their absence from Maori kaingas was caused by

their adoption of civilized employments—one in the Church and one in the Government—which absolutely prevented their returning to their tribes and re-occupying their land in Maori fashion.

A considerable number of claimants now absentee have also maintained their right by having returned and cultivated the soil between 1840 and the present time. These persons will be admitted as resident owners, and will appear amongst that class.

The claims disallowed for non-appearance and other similar causes amount to 149.

The claims disallowed for non-possession, or occupation for an insufficient time to warrant the belief in a domiciliary intention, are 238.

COMPENSATION COURT.

WHANGANUI, June, 1866.

T. H. SMITH, ESQ., *Judge.*

The Claimants to the Ngatiruanui Coast Block.

(Between the Kaupokonui and Whanganui Rivers.)

THIS is a portion of the Ngatiruanui Coast Block, taken under the authority of The New Zealand Settlements Act, 1863, by an Order in Council dated 2nd September, 1865. The Crown Agent, on behalf of the Colonial Secretary, having abandoned the right of the Crown to take that portion of the Ngatiruanui Coast Block which lies to the east of the Waitotara River, and of a line running 20 deg. 30 min. east of north, as shown on the map, the Court has to deal with claims for compensation in respect only of the confiscated land lying to the west of that boundary.

The claims referred to this Court, purporting to relate to land between Kaupokonui and Waitotara Rivers, are 68 in number, and contain 630 names of claimants. In the course of the investigation a large proportion of these names have been shown to be duplicates. Some of the claimants have failed to appear before the Court either personally or by agent, and their claims have not been heard. The number of persons interested in the claims heard by the Court is 265. Of these, the claims of 119 are admitted, those of 146 are rejected. Of the last number, 51 were found to be excluded under the fifth section of The New Zealand Settlements Act, 1863.

The admitted claims are divided into two classes—(1) claims established by proof of actual residence and cultivation up to within a recent period: these are 40 in number; (2) claims of persons long absent and settled elsewhere, but who themselves, or whose parents, or near relatives, were in the year 1840 actual owners and possessors of the land the subject of claim: these are 79 in number. Ancestral claims where neither the claimant nor his parents have ever occupied as settled residents are rejected.

The evidence before the Court shows that the land comprised within the boundaries of this portion of the Ngatiruanui Coast Block belonged to the Ngaruahine, Tangahoe, Pakakohi, and Ngarauru tribes, and to other smaller tribes, more or less connected with these. The boundaries of the land claimed by these tribes respectively can be fixed on or near the sea coast, but there is no evidence as to the inland boundaries, nor any data upon which the extent of territory belonging to each tribe can be determined, neither can the position *or extent of any* of the claims be determined upon evidence before *the Court.* *Such evidence* as would be required to determine these

points it would be difficult, if not impossible, to procure, while the expense and delay involved in attempting to procure it would be greatly disproportionate to any advantage likely to result therefrom, either to the claimants or to the Government. It has appeared to the Court that substantial justice will be done to the admitted claimants by basing a decision as to the value of their claims upon the principle of assuming that the whole extent of the land belonged to the whole number of resident owners in equal proportions, subject to the interest of non-residents. Each loyal resident, or admitted claimant of the first class, will thus be entitled to the value of a single share. The value of the claims of the non-residents, or admitted claimants of the second class, is determined on the following principle: The interest of absentee members of the tribe is admitted by the residents, but the tribal estate must be regarded as held by the actual residents, whose dispossession, by whatever means effected, will be a dispossession of the whole tribe. The interest of absentees who have abandoned the tribal lands, and acquired possessions and a settlement elsewhere, cannot be regarded as existing independently of the tribe, as represented by the residents, or otherwise than as subject to contingencies which may affect the position of the latter as owners and possessors of the common tribal estate. The absentee claims depending solely on the maintenance of possession by the residents, must be held as subject to diminution in proportion to the extent to which the residents became dispossessed of or forfeited their right in the land. The interest of a loyal absentee claimant will thus bear that proportion to the interest of a loyal resident which the number of loyal residents bears to the number of resident rebels.

The evidence before the Court supplies the following data:—The area of that portion of the Ngatiruanui Coast Block, which is the subject of the present investigation, is computed to be 428,000 acres. The open land and available bush, extending five miles and a half inland from the coast line, is estimated at 131,720 acres, leaving as bush land unavailable 296,280 acres. The persons interested in this land as residents number 997. Of these, 957 have been engaged in rebellion since January, 1863, and 40 are residents whose claims to compensation are admitted, the Crown having elected to give the claimants land in lieu of money as compensation for their claims.

It is ordered by the Court that the claimants whose names are set down in the schedule appended hereto, and marked A, are entitled to receive four thousand eight hundred (4,800) acres of open and available land, and eleven thousand two hundred (11,200) acres of bush land, being at the rate of one hundred and twenty (120) acres each of open and available land, and at the rate of two hundred and eighty (280) acres each of bush land. The open and available land to be of value equal to the average value of land lying within five miles and a half inland of the coast line between Waitotara and Kaupokonui, and the bush land to be of value equal to the average

value of bush land lying beyond five miles and a half from the coast line.

It is further ordered that the claimants whose names are set down in the schedule appended hereto, and marked B, are entitled to receive three hundred and ninety-five (395) acres of open and available land, and eight hundred and sixty-nine (869) acres of bush land, being at the rate of five (5) acres each of available and eleven (11) acres each of bush land. The open and available land and the bush land to be of the same value respectively as prescribed in the case of the claimants in Schedule A.

And it is further ordered that the land hereby awarded to the claimants in Schedule A and to the claimants in Schedule B respectively shall be selected by the claimants and by the agents for the Crown in conformity with the ninth clause of the Rules and Regulations for the Practice and Procedure of the Compensation Courts, made by an Order in Council, dated 16th June, 1866, in blocks of such extent and in such localities available for the purpose as may be desired by the claimants, with the view of locating together members of the same tribe, and of including, when practicable, land which they have previously occupied and cultivated, such selection being subject to the final award of the Court.

NATIVE LAND COURT.

April, 1867.

F. D. FENTON, Esq., *Chief Judge.*

PAPAKURA. — CLAIM OF SUCCESSION.

THIS grant was made on the 25th day of February, 1863, and assured to Ihaka Takaanini Te Tihi, his heirs, and assigns, an estate near Papakura, containing 1,120 acres.

The grantee died in the month of February, 1864, seized of these lands, without having made a valid disposal thereof by will or otherwise, leaving three children born in wedlock surviving him, named Erina, Te Wirihana, and Ihaka, one girl and two boys. The widow, on behalf of herself and these children, asks for an order of the Court declaring them entitled to succeed to the above estate, and the right to do so is contested by Heta Te Tihi, a cousin of the deceased, and other members of the tribe. The section of The Native Lands Act, 1865, under which the jurisdiction of the Court in these matters arises, directs the Court to ascertain who, according to law, as nearly as it can be reconciled with native custom, ought in the judgment of the Court to succeed to the hereditaments the subject of the investigation. The intention of the Legislature appears to be that English law shall regulate the succession of real estate among the Maoris, except in a case where a strict adherence to English rules of law would be very repugnant to native ideas and customs. The leaning of the Court will always be to uphold Crown grants and the rules of law applicable to them, and the Court will decline to consider the particular circumstances under which the grant was originally obtained, or the equities which might have been created, or understood to have been created, at the time thereunder, unless the evidence shall disclose strong reasons for deviating from so obvious and desirable a rule. It would be highly prejudicial to allow the tribal tenure to grow up and affect land that has once been clothed with a lawful title, recognised and understood by the ordinary laws of the country. Instead of subordinating English tenures to Maori customs, it will be the duty of the Court, in administering this Act, to cause as rapid an introduction amongst the Maoris, not only of English tenures, but of the English rules of descent, as can be secured without violently shocking Maori prejudices. In this case we think that the evidence discloses no equities in favour of the tribe, and we see no reason to make any interference with the ordinary law, except in one particular. The Court does *not think* the descent of the whole estate upon the *heir-at-law could be* reconciled with native ideas of justice or Maori

custom; and in this respect only the operation of the law will be interfered with. The Court determines in favor of all the children equally. The judgment of the Court, therefore, is unanimous that Erina Takaanini, Te Wirihana Takaanini, and Ihaka Takaanini ought to succeed to the hereditaments above mentioned in equal shares as tenants in common.

NATIVE LAND COURT.

June, 1867.

F. D. FENTON, ESQ., *Chief Judge.*

TIRITIRIMATANGI.

THIS is a claim by Matini Murupaenga and others, aboriginal natives, to have a certificate of title issued in their favour for the Island of Tiritirimatangi, in the Gulf of Hauraki, and is opposed by the Crown. The case was commenced on the 8th of December last, and was adjourned to the 13th of March; was then further adjourned for six weeks to enable the Crown to procure certain documents, and was again further adjourned for one month, these documents, which were alleged to be necessary to the case of the Crown, not having been received by its representatives here. The case has now been concluded, and comes up for judgment.

The proofs for the plaintiff's case rest on the evidence of persons of the Ngatipoataniwha and Ngatitaihawa tribes and their relatives and co-claimants, and consist mainly of ancient occupancy, chiefly before the time of the Ngapuhi incursions into this part of the country—the main facts being, that the ancestors of the claimants lived there and cultivated there, were buried there, and had built a pa there, the remains of which have been seen by the present generation, and may, as was stated by one witness, be discovered at the present day. From the time of the Ngapuhi invasion, the ancient possessors do not appear to have ever held permanent possession of the island, nor indeed to have exercised any dominion over it, beyond acts of a very transitory nature, indicating only temporary occupation, and no intention of permanent domicile. Although the case thus made out is in itself meagre, yet it is of sufficient validity to have justified the Court in ordering a certificate of title, if no counter claimant or objector had appeared.

But there appears as an opponent and counter claimant, the Crown, whose case must be carefully considered. The learned counsel for the Crown places before the Court a copy of a deed of conveyance dated in 1841, executed by chiefs of the Ngatipaoa, purporting to convey to Her Majesty and her successors a large tract of country extending from Takapuna Head to Te Arai, "and all trees, waters, water-courses, ditches, fences, and islands (not before sold), and everything else above and below these lands." In a subsequent part of the deed, which may be called the *habendum* part, the phrase of description runs thus: "From the entrance of Waitemata *to Te Arai,* and all the islands of this shore, and all places

inside the described boundary not before sold." This deed was followed by others, conveying the same estates and signed by members of other tribes, amongst others by persons who may fitly be admitted to be representatives of the present claimants, and by whose acts they should be bound. Now it appears to the Court very doubtful whether the phrase "all trees, waters, water-courses, ditches, fences, and islands," etc., apart from any extraneous circumstances, was ever intended by either vendors or purchaser to include the mass of islands out in the Hauraki Gulf, lying at considerable distances from the main land. These words appear to the Court to have little more meaning than is usually attached to similar words in an ordinary English conveyance, known to lawyers as "general words." And although the words which occur subsequently, "and all the islands of this shore," etc., have apparently more force, and might be held to show a specific intention, yet *noscitur a sociis*, and the words which follow, and which are clearly pure surplusage, force to the conclusion that the several large islands on the far side of the ship channel, of which Tiritirimatangi is one, were never in the contemplation of the drawers or of the signers of the deed. The Court could not fail to be struck with the fact that no attempt was made on the part of the Crown to show by evidence that any other of these islands—some of which are much nearer to the mainland and smaller than Tiritirimatangi—were ever held, or supposed to be held, under titles derived from these transactions. On the contrary, in the case of Rangitoto, the Crown relied entirely on three distinct conveyances, signed, some of them, by the signers of the deeds now produced, which deeds would clearly have been entirely unnecessary if our deeds had the effect which the counsel for the Crown now endeavours to attribute to them, especially as the words "not previously sold" would apply with equal force to Rangitoto as to Tiritirimatangi. The Court cannot believe that if the officers of the Crown, at the time of the completion of this transaction, thought that they had negociated for and purchased large islands, such as Tiritirimatangi and Rangitoto, they would have omitted all mention of them in the conveyance, and relied for their title upon "general words"—"waters, watercourses, hedges, ditches, and islands." If the view taken by the Court is correct, the point for which the subsequent deed releasing the reserves called Waimai and Te Tumu was produced will be of no importance, for the question does not arise as to whether the parties conveying were the proper owners.

The other muniment put in by Mr. Gillies is the judgment of Mr. Bell, Commissioner of Land Claims, in which the ownership of Tiritirimatangi is incidently mentioned. But the Court is unable to see what direct bearing this judgment can have on the case before us. It commences thus:—"This claim is for compensation for land at the North Head of Auckland Harbour, taken by the Crown in 1841, upon the establishment of the Seat of Government on the Waitemata." That was the matter which Mr. Commissioner Bell was *trying, and not the title to* Tiritirimatangi. In the course of the

judgment Mr. Bell says that Mr. Taylor having formerly the right to select land in lieu of the North Head, which had been taken from him by the Government, selected, amongst other lands, Tiritirimatangi, which Mr. Clarke, Protector of Aborigines, had reported to have been purchased from the natives, but for which no grant had been issued to Mr. Taylor by the Crown; and Mr. Bell adds, "It is difficult to ascertain why the grant for Tiritirimatangi was not made by the Crown," and he concludes by ordering that "scrip be issued to John Logan Campbell for the sum of £250, and to Ranulph Dacre for the sum of £250, in commutation of their claim to a grant of the Island of Tiritirimatangi, and in satisfaction of all claims in this case." It occurred to the Court that it was possible that the grant was never issued, because the Government had in the interim discovered that the native title had not been extinguished. In the notorious case of Pukekohe, the grants had even been issued, and the Government was compelled by such a discovery, and the obstinacy of the recusant natives, to call them all in, and compensate the grantees at a great cost. No doubt if the grant for Tiritirimatangi had ever been issued, as contemplated, the Court would have been incompetent to entertain the question of previous extinguishment of native title, for its jurisdiction would have been destroyed; but, in the absence of a grant, although the reason for the non-issue of it may, as Mr. Bell says, be "difficult to ascertain," the Court cannot hold the simple opinion of an officer of the Government, recited by Mr. Bell, to be entitled to much weight. If Mr. Clarke's knowledge is conclusive, why was he not produced as a witness for the Crown in this case? Moreover, as a question of law, it is not clear how this judgment could, in any case, be made to affect the interests of the parties now claiming, for they were no parties to the suit, and were, as the evidence proves, ignorant of it, or of any other proceedings in Mr. Bell's Court regarding the island of Tiritirimatangi. Coke says that "law is the perfection of reason," and, no doubt, a man who has the capacity of thinking correctly, will, in ninety-nine cases out of a hundred, come to the same conclusion to which a rule of law would lead him, and it is surely common sense which says that if A brings an action against B for the recovery of a chattel or a field, the rights, such as they are, of C or D shall in no way be determined or prejudiced by the result unless he is cognizant of and a party to the proceeding. But we do not understand that Mr. Gillies relied upon these proceedings in Mr. Bell's Court to do more than show that in 1844 the Government were in the belief that the native title to Tiritirimatangi had been extinguished, and for that object, no doubt, the record is valuable.

The Court, then, is of opinion that the real origin of the Crown's title has not been shown, and that if the case for the Crown rested simply on the documentary evidence, it would scarcely avail to upset the claimants, although their case is undoubtedly weaker than most cases that come under our consideration. But the facts disclosed on the examination of the plaintiffs' witnesses, and in the direct testimony

for the defendant, appear to the Court to be of great force, and in a case of this kind, in fact, to be of such a character as to remove from our minds the hesitation and doubt which the disclosure of the grounds of the Crown's opposition had caused us to entertain.

It appears that Messrs. Taylor, Macmillan and Campbell lived on the island at a very early date, without any forcible interruption or question even from natives; that they were succeeded by Mr. Duder, whose evidence made great impression upon the Court, though we attach no importance to the conversation about the land being the Queen's, for he did not know whether that declaration was made by the present claimants or by others; that Duder lived there without any attempt at eviction being made by the natives, and that he suffered no inconvenience from them except such as a man similarly situated would always be liable to, viz., the destruction of his pigs by the dogs of casual visitors; that from 1861 Duder lived there with the express authority of Government, and that he finally left the place because he could not obtain a license. And then there followed the erection of a lighthouse, gradually rising, and visible to all beholders for miles round, as if challenging claims of title to the place. Yet, during all this period of time, extending over a quarter of a century, the natives made no claim, nor entered any protest. Murupaenga's explanation of this damnatory silence is that they knew that it was of no use appealing to the Government for redress, but as soon as a Court was established, where they could be fairly heard, they asserted their claim. But this explanation of a most singular silence cannot be received. The first Native Lands Act was passed in 1862, and was in force, and in actual operation in the district of country where these persons reside; and although its actual work was, from its cumbersome character, of limited extent, yet there existed no reason why these parties should not have made a claim whilst the lighthouse was rising before their eyes. But they slept on their rights, if they then thought they had any, until the claim was made by Takapuna for Orakei, when this claim appeared almost simultaneously, and certainly of a very similar character.

Although, therefore, the Court is unable to discover the origin of the Crown's title, or by what means the native title has been extinguished, yet we are of opinion that the case made out by the claimants is altogether deficient of those elements of strength which would justify us in disturbing the Crown in its possession. To eject a person from his possession, it is not sufficient to show the weakness of his title, but a better must be displayed, and we think that this has not been done. Judgment must therefore go against the claimants.

It may be well, before concluding, briefly to notice one or two matters which have arisen in the course of this protracted trial.

In the first place, the doctrine set up by the learned counsel for the Crown that the proof of "holding" or the customary usage under *which a native* claim must be established must be, as of the year *1865, the date of the passing* of our Act, cannot, in the judgment of

the Court, be maintained. His own argument, as to the use and power of a preamble, will go a long way to upset this interpretation. The principal object of the Act is to convert Maori holdings into tenures recognized by the law, and, if Mr. Gillies' doctrine is to prevail, the intention of the Legislature will fail. The law is that a statute must be interpreted "*ut res magis valeat quam pereat.*" The word "held," although, grammatically speaking, a participle indicating time, must be construed rather as a word of description, and not limited to any particular moment The law of construction in cases of this sort is clearly laid down by Abbott, Chief Justice, in Rex *v.* Hall, 1 Barn. and Cress. 123: "The meaning of particular words in Acts of Parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be obtained. Thus, the *inhabitants* of any county, etc., taking that word in its strict or in its popular sense, are those persons only who have their dwelling therein. But the object of the statute being to raise a fund for the repair of bridges by the taxation of persons, * * * the word inhabitant has been held to include all the occupiers, although actually living in some other county." Thus, the object of The Native Land Act being to determine the native titles to land in New Zealand, and to establish recognised tenures in lieu thereof, we must so construe the Act as to give as much effect as possible to the clear intentions of the legislature; and if the construction contended for were allowed to prevail, the Act would very largely fail of effect. Mr. Gillies' objection to hearsay evidence, as applied to pedigrees, is also untenable. The trite rules of evidence, which during many centuries have been elaborated in England and made to suit the circumstances of a most advanced civilisation, cannot be invariably applied to trials in a Court of this description, where the uncultivated man, without a literature, and without a written history of his nation, or of his property and belongings, is brought into contact with the refinements of a system of law gradually developed by the efforts of a succession of civilised intellects. But the principles on which those rules are based are deduced from the most simple fairness, and may be found in the consciences of all men. And it is to these principles, more than to the rules themselves, that resort will be advantageously had; more than this, we do not think that the objections taken and urged with some force of language are even strictly correct as a matter of bare law. Taylor writes thus:— "Questions of pedigree form the second exception to the general rule rejecting hearsay evidence. This exception has been recognised on the ground of necessity; for as, in enquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known but to few persons, it is obvious that the strict enforcement of the ordinary rules of evidence in cases of this nature would frequently occasion a grievous failure of justice. *Courts of* law have, therefore, so far relaxed these rules in

matters of pedigree as to allow parties to have recourse to traditional evidence, often the sole species of proof that can be obtained." *Necessitas non habet legem* is a legal maxim as well as a popular proverb.

The Court, before concluding, feels that it is in duty called upon to notice the non-production of the deeds for which the trial has been so frequently adjourned. The position of the learned counsel for the Crown has been, if possible, one of greater embarrassment than that of the Court itself, although, of course, his responsibility is less. The copies produced are in no legal sense records, but simply copies of deeds. If they are set up as records, we would say, as the Privy Council said in a recent case touching the repeal of a Crown grant by *scire facias*, "If they are records, of what Court are they records?"—See Bacon's Ab. Tit. Record. These copies were admitted simply on the ground that they afforded the best evidence that could be obtained, the originals being (if in existence) in the possession of an authority beyond the reach of any power conferred upon the Court. It is not for the Court to conjecture why these deeds have not been forthcoming, and Mr. Gillies was silent on the subject. It is necessary to allude to this question, for the admission of copies in this trial must not be construed into a matter of course precedent. It will always be necessary to show that attempts have been made to obtain the best evidence, before the Court will receive the second best. It must also be apparent that the non-production of the originals may often operate injuriously to the Crown's interest; for a native might, and very likely would, deny his signature when viewing the copy, which he might frankly admit if placed before him in the original instrument. It may be well to add that if the muniments of the Crown estates were deposited in some place where they would be accessible to suitors or claimants, or intending claimants and their legal advisers, we think that many cases of the character of the one just decided would be kept back, and would not be brought into Court. For example, there can be no question that if the counsel for the natives who claimed Rangitoto could have inspected the deed of purchase before appearing in Court, the natives would never have appeared there at all. If this claim to Tiritirimatangi could have been determined at once, we have no doubt that the natives would have received the decision with little regret, certainly without a murmur; but the long protraction of the trial, and the apparent difficulties in the progress of the Crown's defence, have raised and strengthened hopes which, now that they are destroyed, will naturally be succeeded by feelings of disappointment and bitterness.

NATIVE LAND COURT.

CHRISTCHURCH, April 28th, 1868.

F. D. FENTON, ESQ., *Chief Judge*; *and* HENARE PUKUATUA, *Arawa Chief, Native Assessor.*

RAPAKI. (Interlocutory).

THE issues upon which it has been arranged that the Court should give an interlocutory decision are as follows :—

1. Are the Kaiapoi natives entitled to share the Rapaki Reserve by their descent from the Ngatitahu tribe ?

2. Are all the descendants of the six old men and party equally entitled to the Rapaki Reserve ?

3. Who are the descendants of the six old men of Rapaki ?

4. Have any natives besides the descendants of the six old men a claim to the reserve by occupation ?

5. Have those claimants to the Rapaki Reserve, who now come from Kaiapoi, not lost their right by having their abode at Kaiapoi from the time of the reserves being made ?

6. Would the alleged agreement made at Kaiapoi at Mr. Buller's suggestion alter the title to the reserves at Rapaki ?

Upon the first and last issue the Court can give a clear and distinct opinion, but the answers to the other issues depend entirely upon the tracing of persons and their relationships, which cannot be done at this stage of the proceedings, and must await further evidence. The general opinion, however, which the Court feels itself able to give will render this subsequent proceeding a matter of no difficulty, and indeed will in all probability so far indicate the views of the Court as to render further evidence unnecessary, by enabling the parties to arrange between themselves to whom the Rapaki Reserves should be granted.

As to the first issue, the Court is of opinion that the persons generally styled in the course of this trial "the Kaiapoi natives" are not entitled to claim any share in the Rapaki reserve by reason of their descent from a remote ancestor common to them and the persons similarly styled "the Rapaki natives"; or, in other words, on the ground that they are all members of the Ngaitahu tribe. It has never been the rule of the Court to recognise such a claim, and, even if stronger reasons had been shown than the counsel for the Kaiapoi natives has been able to produce, the Court would have been very reluctant to depart from a rule which has now received the sanction of innumerable precedents.

The last issue must be answered in the negative. The admission of certain of the Rapaki natives into the ownership of the Kaiapoi reserve appears to have been entirely voluntary on the part of the owners of the latter, and there is no evidence that they obtained or even sought for any reciprocal rights over the Rapaki reserve. The terms on which the Rapaki natives were admitted to participate in the division of the Kaiapoi reserve are sufficiently indicated in the terms of arrangement of that reserve produced by Pita Te Hori, himself a Kaiapoi native and a signer of the document, the whole instrument being, as counsel will remember, in Mr. Buller's hand-writing—"Tena atu etahi tangata, kei hea atu ranei, he whanaunga ia no matou; a ko ratou anake te uru e ata whakaaetia ana e te Runanga."—"There are other persons living at divers places, who are our relatives, of whom those only shall be admitted to participate who shall be approved by the Assembly." It appears that under this principle, or under the rules contained in the two preceding clauses of the instrument (relating to those men who had married Kaiapoi women, and to certain Port Levy natives) the Kaiapoi Assembly admitted many non-residents into their reserve—from Port Levy, 4; Wairewa, 6: Taumutu, 2; West Coast, 4; Waikouaiti, 1; Kaitaki, Taieri, 1; Kaikoura, 1; Waimatemate, 1; Ruapuke, 1; Otakoukou, 1; North Island, 1; Rapaki, 18; besides 5 from Moeraki whom the Court does not include in the above list, as it appears that part of the reserve at Kaiapoi was expressly made for them. Now, there is no doubt in the mind of the Court that this admission of owners of other reserves was made with the sanction of Mr. Buller. It has not been shown what was the official position of that gentleman in the subdivision of the Kaiapoi Reserve, or under what law he was acting; but the evidence has clearly proved that he was appointed by the Government, and that the natives recognised in him an officer of the Government armed with lawful authority, and whose advice or injunctions they did not feel themselves at liberty to refuse or dispute; and, although the arrangements made, as disclosed in documents placed before the Court, appear to have been spontaneous on the part of the natives, there can be no doubt that the whole proceedings were managed by Mr. Buller, and that the natives were assentients to his suggestions. If that gentleman had proceeded further, and applied the same principles in the subdivision of all the other reserves made for the Ngaitahu tribe, substantial justice would have been done, as far as these reserves are concerned, though an injurious confusion would have resulted, many natives owning pieces of ten or twenty acres of land in several widely separated parts of the country, all or most of which they could not possibly cultivate. But his operations began and ended with the Kaiapoi Reserve; and we do not think that the expression "Kaiapoi should be a pattern" (tauira) was ever intended to mean more than a general agreement that the other reserves should be subdivided, not that all the rules *then* adopted should be applied to all the reserves. Indeed, such a *construction would be impossible*, for many of the provisions could

not apply; such, for instance, as those relating to timber on reserves where there is no timber. But even if all applicable rules were to be adopted in future operations, as far as this case is concerned, the principle of admitted ownerships would be contained solely in the clause previously quoted, namely, that "such relations only should be admitted as might be agreed to by the owners of the reserve (under division)." The Court is therefore of opinion that none of "the Kaiapoi natives," using that phrase with the meaning in which it has been used throughout this trial, have any claim over the Rapaki reserve, except, to use their own words, such "as shall be voluntarily admitted," a condition which does not constitute a right.

The 2nd, 3rd, 4th, and 5th issues are cognate in character, and cannot (especially the 3rd) be finally decided at present, but the general view of the Court on the facts and principles involved may now be indicated with sufficient clearness to render subsequent proceedings simple. Mr. Mantell's evidence is corroborated by the native testimony, and is conclusive that the owners of the land conveyed by the Port Cooper deed, are represented by the signers of it, and for them the Rapaki reserve was made. In the judgment of the Court, these men and their representatives, and those whom they choose to admit as relatives, must be the grantees of the reserve now litigated. It is very probable that a list of names made out under this rule will comprise the whole of the living descendants of the six old men who took possession of the place after Rauparaha's invasion; but whether it does or not, the Court cannot move from the *status* of the title as fixed in 1849, when the great transactions with Mr. Mantell took place.

The Court feels that it would be leaving its duty only half discharged, if it failed to notice the character of the deeds purporting to extinguish the native title to this island, which have been produced before it. Whether the deed called the "Ngaitahu Deed" can have any effect whatever in law is not a question upon which it is necessary to pronounce any opinion; but, having been compelled in the course of these proceedings to consider the terms and stipulations in this and other deeds produced, the Court could not fail to be struck with the remarkable reservation by the vendors of all their "pas, residences, cultivations, and burial-places, which were to be marked off by surveys, and remain their own property." This provision has not, according to the evidence, been effectually and finally carried out to the present day, nor has any release been sought for by the Crown. The witness, Mr. Mantell, who seems to have had great powers entrusted to him at one time by the Government, to carry out the intentions of the parties to these deeds, appears never to have retained them for a sufficient length of time to enable him to obtain from the natives a deed of conveyance whose validity could neither be questioned from incapacity in the grantee nor from uncertainty as to the parcels or reserved parcels. Conflicting instructions from the Government seem to have reached him with a curious rapidity, and finally his most useful powers were withdrawn before he had been able

effectually to operate under them. The Court feels very strongly that it would be greatly to the honour and advantage of the Crown that the stipulations and reservations in these deeds of purchase should, without further delay, be perfectly observed and provided for. The present large assemblage of the persons interested has removed many of the difficulties which would otherwise attend the obtaining of the necessary agreement and release.

Lastly—although as a rule this Court carefully endeavours to avoid following equities, confining itself to creating and dealing with legal estates—it feels that it ought to express its clear opinion that the Kaiapoi natives have, by adopting a principle in the subdivision of their reserve which this Court cannot follow, suffered a loss to the exact amount of the land apportioned, with Mr. Buller's sanction, to natives for whom other reserves had been set apart; and although, as far as has been shown to the Court, that gentleman had no direct authority at law for what he did, and was in fact a volunteer, or might be compared to an *executor de son tort*, yet, as before observed, the evidence clearly shows that the natives believed him to be a duly authorised officer of the Crown, and they acted without question upon his suggestions; and we think that natural equity requires that land to the amount lost by them should be found for them elsewhere by the Government.

NATIVE LANDS COURT.

CHRISTCHURCH, 5th May, 1868.

F. D. FENTON, ESQ., *Chief Judge*, and HENARE PUKUATUA, *Arawa Chief, Native Assessor.*

CLAIM OF HEREMAIA MAUTAI AND OTHERS TO KAITORETE.

THIS is an application to the Court for a certificate of the title of Heremaia Mautai and others to the strip of land situate between Lake Ellesmere and the sea, on the ground that they inherited it from their ancestors, and never sold it to the Crown or abandoned the possession. The Crown, on the other hand, put in a deed of conveyance with a plan annexed, signed by a large number of the Ngaitahu tribe, of which the claimants are members, purporting to convey to Mr. Wakefield, Agent to the New Zealand Company, a large tract of country, including the peninsula in dispute; also produces a receipt for money, signed by the claimant and others, which receipt expresses that the money was paid on account of the transfer of land described in a plan. It is objected by the claimants that the deed of conveyance, being to Mr. Wakefield and not to Her Majesty, is invalid and totally without effect under the 13th cap. of the Royal Instructions of 1846, and the receipt by itself will not be sufficient as a memo. in writing signed by the party to be charged therewith, to take the transaction out of the Statute of Frauds, and that, therefore, the native title has never been extinguished, and the Court has jurisdiction over the land claimed which it ought to exercise in favour of the claimants.

The case is one of vast importance, immediately concerning the title of the Crown to nearly the whole of this and other provinces, and raises points of a difficult and conflicting character. And the Court feels that it is scarcely a fit tribunal for the determination of such important legal principles, and such great constitutional questions. But, as a decision must be arrived at, the Court will endeavour so to express its opinion that no doubt can exist as to the grounds of it, and a subsequent application to the Superior Court to reverse the judgment and quash it, if wrong, may be made without any difficulty.

The value and effect of the deed of conveyance to Mr. Wakefield, which has been called the Ngaitahu deed, must be first enquired into.

And before this can be done it will be necessary to enquire into the character given by the legislation of the Imperial Parliament, and

the Parliament of this Colony to the Waste Lands thereof, and to the rights of the aboriginal inhabitants therein.

The views of the Imperial Parliament and of the Crown appear to have constantly varied with respect to the nature and extent of the rights and interests possessed by the aborigines in the wild land of New Zealand. At first the Maoris were regarded by the Crown as an independent and organised state, capable of forming a treaty; and a treaty was formed with them on the 16th February, 1840, by which they obtained "all the rights and privileges of British subjects," and a confirmation and guarantee of "the full, exclusive and undisturbed possession of the lands and estates, forests, fisheries, and other properties which they collectively possessed, so long as they wished and desired to retain the same in possession," and they yielded to the Crown right of pre-emption "over such lands as they *might be disposed* to alienate," and ceded as well all rights and powers of sovereignty possessed by themselves over their respective territories as sole sovereigns thereof."

The question as to the nature of the rights of the chiefs or the amount of territory over which they extended was not dealt with in this compact. Although there is no doubt that the conditions laid down by Vattel and other writers on international law as necessary to constitute a regular treaty, were not fulfilled in the treaty of Waitangi, yet as it has been acted upon for many years as of sufficient validity, and constitutes in fact the foundation on which the English sovereignty in the Northern Island has been built up, and is now sustained, it must be accepted as a valid treaty, forming part of the law, and it is necessary to enquire what is the interpretation that has been, and is put, by the Crown on it as affecting its own territorial rights and those of the natives.

The Charter of 1840, erecting the colony of New Zealand, empowers the Governor to make and execute in Her Majesty's name and on her behalf, under the public seal of the colony, grants of waste lands to her belonging within the same, "and provides that those Letters Patent should not affect the rights of any Aboriginal natives of the colony, to the actual occupation or enjoyment in their own persons of the lands *now actually occupied or* enjoyed by such natives."

The idea here seems to have been that the Governor might grant all lands except those actually occupied by natives, and in accordance with this view he was instructed by the Crown in the same year, "to cause a survey to be made of all the land within the colony, and to divide and apportion the whole of the said colony into counties." And Her Majesty declared "it to be her will and pleasure that all the waste and unclaimed lands within the colony belonging to and vested in Her Majesty, which should remain (after making certain reserves) should be sold and disposed of." At this time, then, all the waste lands were held to be in the Crown, with the exception of such land as might be reserved for the uses and in manner specified, and such *lands as were actually used by* natives.

A statute of 1841 passed by the Government and Legislative Council, called the "Land Claims Ordinance, No. 1," goes further, and if the language of the legislature in future years had been as clear and had remained the same, this case would never have come before the Court, nor indeed would the Court have had any existence. The second section says, "it is declared, enacted, and ordained that all unappropriated lands within the said colony of New Zealand, subject, however, to the rightful and necessary occupation, and use thereof by the Aboriginal inhabitants of the said colony, are, and remain Crown or domain lands of her Majesty, her heirs, and successsors, and that the sole and absolute right of pre-emption from the said Aboriginal inhabitants, vests in and can only be exercised by her said Majesty, her heirs, and successors, and that all titles to lands in the said colony of New Zealand, which are held or claimed by virtue of purchases or pretended purchases, gifts or pretended gifts, conveyances or pretended conveyances, leases, or pretended leases, agreements, or other titles, either immediately, or immediately from the chiefs, or other individuals, or individual of the Aboriginal tribes inhabiting the said colony, and which are not or may not hereafter be allowed by her Majesty, her heirs, and successors, are, and the same shall be absolutely null and void.

Under this statute the whole land of the colony became demesne of the Crown subject to certain or rather uncertain rights in the Maories.

The Royal instructions of 1846, direct that such parts of the island of New Zealand as were or should be owned or lawfully occupied by *persons of European birth or origin*, should be divided into municipal districts; and with reference to "waste lands of the Crown," provided that charts of the New Zealand islands should be prepared, and especially charts "of all those parts of the said islands over which either the aboriginal natives or the settlers of European birth and origin had established any valid titles, whether of property or occupancy," and natives, either as tribes or as individuals, claiming a property or possessing title, were to send in claims and have them registered, and all lands not so claimed or registered should be considered as vested in Her Majesty, and constituting her demesne lands in right of her Crown within the New Zealand islands; and finally all doubt is removed by the provision that no native claim should be recognised except for "land occupied or used by means of labour expended thereon."

And the 13th chapter contains the following provision, "the conveyance or agreement for the conveyance of any of the lands of or belonging to any of the aboriginal natives, in common as tribes or communities, whether in perpetuity or for any definite period, whether absolutely or conditionally, whether in property, or by way of lease, or occupancy which may be henceforth made, shall not be of any validity or effect, unless the same be so made to or entered into with us our heirs and successors."

The character attached by the English authorities to the

lands of the colony up to this period, seems to resemble very much that of the folcland or public land of the Saxons; and the above instructions appear to have provided for the conversion of this folcland into bocland or land of inheritance, the resemblance being continued in the process. All lands not appropriated were to be considered as demesne lands of the Crown, or Crown lands, (for the two phrases appear to mean the same thing.) Allen, in his inquiry into the Royal Prerogative on this subject says:—"From these appropriations of the public lands to the King as representative of the State, the word folcland fell into disuse, and gave place to the term of terra regis or Crown land. Antiquaries inattentive to this change of language have bewildered themselves among copy-holds and commons in search of the folcland of their ancestors."

The view thus taken by the Imperial Government of the respective rights of the Crown, and of its aboriginal subjects in the territory of the colony, is clear and distinct; but it was objected to by the natives, and was never carried into practice, and in fact could not have been in a peaceful manner.

By the 10 and 11 Vic., c. 112, the several provisions relating to the settlement of the waste lands of the Crown contained in 13th chapter of the said instructions, of 1846, except such as relate to the registration of titles to land, the means of ascertaining the demesne lands of the Crown, the claims of the aboriginal inhabitants to land, and the restrictions on the conveyance of lands belonging to natives, unless to Her Majesty, were suspended in New Munster.

The proceeds of land sales were, amongst other things, to be applied in and about the compensation to be made to the aboriginal inhabitants of New Zealand for the purchase or satisfaction of their claims, right, or interest in the said demesne lands.

14 and 15 Vic., chap. 84, empowers Her Majesty to make, or to authorise the Governor to make, regulations for the disposal of the demesne lands of the Crown in Wellington, New Plymouth, and Nelson.

It thus appears that a gradual change took place in the interpretation put by the English authorities on the territorial rights of the aborigines, between the years 1846 and 1851; and the Constitution Act clearly contemplates the practical exclusion of land, in which the native interest is still unextinguished, from the category of "Waste Lands." Thus from being considered as the demesne lands of Her Majesty in right of her Crown, subject or not to a certain payment to be made, the unoccupied territory of the colony, in the hands of the aborigines, came to be regarded as their distinct and admitted property, but inalienable to any person other than the Crown. The slight variation of this latter limitation made in after times by the Native Land Act, 1867, need not here be noticed.

At the time of the execution of the Ngaitahu deed the provision in the 13th cap. of the Royal instructions was in full force, as well as the previously cited enactment in the Land Claims Ordinance of 1841. And in addition to those laws which rendered conveyances of

native land to any person except her Majesty invalid, the Native Land Purchase Ordinance made them absolutely illegal, and attached heavy penalties to persons taking possession of lands or acting under them. But this Ordinance was repealed by the Natives Land Act, 1865, and it will not be necessary again to refer to it.

The Ordinance of 1841, and the 15th cap. of the Royal Instructions, render it difficult to find any grounds on which the Ngaitahu deed can be held as valid at the date of its execution, as creating a title in the purchaser. And it is the opinion of the Court that at that time it had no force to operate as a conveyance of the land referred to therein, to the person and in the manner therein expressed.

And here, before going further, it will be necessary to glance at the events which had been taking place all this time, and which have since taken place affecting the block of land in which this claim is situate. By letters patent, dated the twelfth day of February in the fourth year of the reign of Her Majesty, certain persons therein named were constituted a Body Corporate, with perpetual succession and a common seal, by the name of "The New Zealand Company," for the purpose of purchasing, acquiring, and alienating lands within Her Majesty's colony of New Zealand and its dependencies, and for other purposes therein set forth. And Her Majesty on the twenty-third day of December, one thousand eight hundred and forty-six, issued instructions accompanying the New Zealand charter of the same date, and providing amongst other things in the thirteenth chapter thereof for the settlement of the waste lands of the crown in the said colony of New Zealand, and on the twenty-seventh day of January, one thousand eight hundred and forty-nine, issued certain additional instructions in relation to the said lands containing amongst other provisions the provision before quoted avoiding conveyances to private purchasers from natives. By 10 and 11 Vic. entitled "An Act to promote colonization in New Zealand, and to authorize a loan to the New Zealand Company," after enacting that the provisions relating to the settlement of the waste lands of the crown, contained in the thirteenth chapter of the said instructions, with the exceptions therein mentioned, should be suspended, and of no force and effect within the province of New Munster, until the fifth day of July, in the year one thousand eight hundred and fifty, and during such further time as should be directed by Parliament, and that all the demesne lands of the Crown in the said province of New Munster, and all the estate and right of Her Majesty therein or power and authority over the same or any part thereof should from and immediately after the passing of the said Act, and during the suspension of the said instructions, be absolutely and entirely vested in the said New Zealand Company in trust to sell or otherwise dispose of the same as therein mentioned, it was enacted that if the directors of the said company should give notice to one of Her Majesty's Principal Secretaries of State within three calendar months next after the said fifth day of April, one thousand eight hundred and fifty, by any instrument under the seal of the company, that they were ready to

surrender the charters of the company to Her Majesty, all claim and title to the lands granted or awarded to them in the colony, all the powers and privileges of the company (except as therein provided) should cease and determine, and all the lands, tenements, and hereditaments of the company in the colony should thereupon revert to and become vested in Her Majesty as part of the demesne lands of the Crown in New Zealand, subject nevertheless to any contracts which should be then subsisting in regard to any of the said lands, and upon certain other conditions therein provided. By Letters Patent dated the 13th November in the 13th year of Her Majesty, certain persons therein named were constituted a Body Corporate with perpetual succession and a Common Seal, by the name of "The Canterbury Association" for founding a settlement in New Zealand and were empowered to purchase, hold, and alienate lands in the said colony of New Zealand and its dependencies: And by an agreement dated the First day of December One thousand eight hundred and forty-nine between the "Canterbury Association" and the New Zealand Company, the New Zealand Company agreed to reserve as the site of the Canterbury settlement therein mentioned, and to place at the sole disposal of the Canterbury Association the lands described in a Schedule annexed to the Act 13 and 14 Vic. cap. 70 (hereafter quoted) during the term of ten years from the date thereof, subject to the payment by the Association of such sums of money and the performance of such conditions as were therein mentioned.

The directors of the New Zealand Company gave notice in pursuance of the said Act, of their being ready to surrender the charters of the company, and all the lands, tenements, and hereditaments of the company in the said colony, including those described in the said schedule, thereupon reverted to, and became vested in Her Majesty as part of the demesne lands of the Crown in New Zealand, subject nevertheless to any contracts then subsisting in regard to any of the said lands, and to certain other conditions therein mentioned.

And the before-mentioned Imperial Act of 13 and 14 Vic. cap. 70, enacts—

That neither the thirteenth chapter of the said instructions, dated 23rd December, 1846, nor the said additional instructions of the 27th January, 1849, shall thenceforth apply to the lands described in the schedule annexed to the Act during the period thereinafter provided. The schedule is as follows;—

"All that tract of waste and unappropriated land formerly in the possession of the New Zealand company, situated in the Middle Island of New Zealand, being bounded by the snowy range of hills from Double Corner of the river Ashburton; by the river Ashburton, from the snowy hills to the sea; and by the sea from the mouth of the river Ashburton to Double Corner, and estimated to contain 2,500,000 acres, more or less, with certain exceptions therein *mentioned, not* comprising any native lands, or referring to any rights *of natives.*"

Another Act was passed by the Imperial Parliament, in the following year (14 and 15 Vic. cap. 84), making further provision for the lands of the Canterbury Association, and by the Constitution Act the Association was empowered to transfer their power to the Provincial Council of Canterbury. It is remarkable that no mention was made here of Superintendent, and how a Council which has no corporate existence could take and exercise their powers without the Superintendent, who is part of the legislature of the province, it is difficult to understand. But, however this may be, by sundry instruments, and ultimately by an Ordinance of the Provincial Legislature, the power was exercised, whether legally or effectually it does not concern the decision of the question before the Court to determine.

It appears then that of the two written laws on which Mr. Cowlishaw relies for avoiding the Ngaitahu deed, two are now repealed, and there only remains the provision before quoted in the Land Claims Ordinance, 1841. The provision in the Constitution Act is not retrospective.

Now, it has been long established that when an Act of Parliament is repealed, it must be considered (except as to the transactions passed and closed) as if it never had existed (Surtees v. Ellison, 9 B., and C., 752). "We are to look," said Lord Tenterden, "at the Stat. 6, Geo. 4, c. 16, (which repealed all previous acts), as if it were the first that had ever been passed on the subject of bankruptcy; so in a criminal case (Rex. v. Mackenzie, R. and R., C.C. 429) where an Act from its passing, repealed a former Act which ousted clergy for a certain offence, and imposed a new penalty on the same offence from and after its passing, it was held that an offence committed before the passing of the new Act, but not tried till after, was not liable to be punished under either of the Statutes, (Dwarris). Mr. Cowlishaw admits this general principle of law, but says that the Ngaitahu transaction was a transaction passed and closed. But the evidence does not sustain this position—on the contrary, we find the agent of the Crown who had adopted the contract, coming down and making first a payment of £500, and then at a subsequent period a further payment of £1000, both being part of the original purchase money of £2,000. And indeed, the learned counsel himself has urged upon the Court the clause reserving the pahs, food places, and residences of the natives, and has asked the Court to remember that this provision, has not, even to the present day, been satisfactorily carried out. The Court inclines to the opinion that these repealed laws cannot now be referred to, but must be regarded, in Lord Tenterden's words, "as if they had never existed." But I do not think it necessary to give a decided opinion on this point, for the Land Claims Ordinance, 1841 still remains, and the judgment of the Court will go on different grounds, so that the point is not one of much importance.

Whatever may be the legislative meaning of the phrase "unappropriated lands," used in the Land Claims Ordinance, 1841, the Court is clearly of opinion that the Ngaitahu deed did not vest any estate in Mr Wakefield or the New Zealand Company. As far as

these purchasers were concerned the deed was, in the judgment of the Court, invalid. But I am strongly inclined to think that by the common law of the empire, that deed did suffice to extinguish the title of the tribe Ngaitahu, in the lands described therein, and that the principle of the law is, that no private person may acquire land in such a manner for himself, and that if he makes the attempt, as Mr Wakefield did, he will, if the transaction is fair, extinguish the native title, but will gain nothing for himself, and only give a title to the Crown. It is remarkable that in the Land Claims Ordinance the rights of Her Majesty are expressly saved, so that the common law would not be interfered with by this statute, which is in fact in affirmance of the common law. I give this opinion with great reluctance, for I am aware that this question was argued before the Supreme Court in the case of the Queen *v.* McIntosh, and I am very diffident in expressing my mind on the matter, when I know that the *Gazette* contains the decision of Chief Justice Martin and Mr. Justice Chapman, delivered with much elaboration, after hearing the arguments of the Attorney-General, and the eldest member of the bar in New Zealand (Mr. Bartley), on the other side. That judgment is not accessible here, and I will merely add that though the opinion of the Court now given, if correct, would render further reasons unnecessary, I must now proceed to show other reasons why in the judgment of the Court the case must still go for the Crown, without relying on the effect thus attributed to the Ngaitahu deed.

There is abundant evidence of the existence of a parol agreement by the Ngaitahu tribe, or the majority of them, to sell the block of land to Mr. Wakefield. It is also clear that this contract was adopted by the Crown, and acted upon as its own. Mr. Mantell partially reduced this contract to writing by making the memorandum of the receipt of the £500 in part payment of the purchase-money of land described in a plan annexed. Now the maxim is—*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* A subsequent ratification has a retrospective effect, and is equivalent to a prior command. "The doctrine *Omnis ratihabitio retrotrahitur et mandato æquiparatur* is one remarks the Court of Exchequer in a modern case (Bird *v.* Brown, 4 Exc: 798), intelligent in principle, and easy in its application, when applied to cases of contract. If A, unauthorised by me, makes a contract on my behalf with B, which I afterwards recognise and adopt, there is no difficulty in dealing with it, as having been originally made by authority. B entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case B is precisely in the condition in which he meant to be; or if he did not believe A to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A as principal at his option, and has the same equities against me, if I sue, which he would have had against A."

"But the authorities go much further, and show that in some cases, where an act which, if unauthorised, would amount to a

trespass as done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and to treat it as having been done by his direction. But this doctrine must be taken with the qualification that the act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies."

Such being the law as between private individuals, the question arose in Buron *v.* Denman, 2 Exc. 167, whether it applies likewise where the Crown ratifies the acts of one of its officers, and the majority of the judges presiding at the trial at bar in that case held clearly that it does so. The ratification of the defendant's act by the Minister of State was held equivalent to a prior command, and rendered it an act of State for which the Crown was alone responsible (Parke B. *dubitante*) and that such defence was open on the general issue.

The contract, then, such as it was, was capable of being legally ratified by the Crown, and I think that the evidence shows that the original parol agreement was adopted, and has been partly performed by the Crown. The question then arises whether the agreement itself was of such a character, and whether the part performance has been sufficient to render powerless the Statute of Frauds. The payment by Mr. Mantell, on behalf of the Crown, of sums of money on account of the part contract, is no doubt something, but by itself would not have induced a Court of Equity to decree specific performance. Taken, however, along with the receipt which has been produced, and which is in the following terms:—"Hakaroa, 22nd Feb., 1849. On this day was paid to us the second payment for our land, the plan of which is here attached; (£500) five hundred pounds of money was paid to us; Mr. Mantell, the Commissioner for Extinguishing Native Claims, divided it amongst us," and which was annexed, as distinctly proved by Mr. Mantell, to the plan which includes the block now litigated; there can be little doubt that the contract, after the signature of that receipt, will take a higher rank than a mere parol agreement, and will be almost, if not quite, an "agreement for the sale of land signed by the parties to be charged therewith," and will be taken out of the Statute of Frauds.

It will be convenient to treat together the judicial leaning on this subject, and I will quote from Tudor and White on the leading case, Foxcroft and Lyster.

In this case specific performance of a parol agreement to grant a lease was decreed, notwithstanding the Statute of Frauds, after acts of part-performance on the part of the lessee by pulling down an old house and building new houses according to the terms of the agreement.

The final decision was by the Lords, and is in the following terms:—

Die Lunae 7 *Aprilis* 1701. Upon hearing counsel on this appeal *it was ordered and* adjudged by the Lords, that the decretal order

dismission complained of should be reversed, and that the respondent, Isaac Foxcroft, or such other of the respondents to whom the estate in question should come, by virtue of his father's will, should, when he or they should be of age, execute to the appellant Lyster, his executors, &c, such a lease of the premises in question, as was prepared and approved of by the said Isaac Foxcroft, the father, before his death, and that the appellant and his assigns should, in the mean time, hold and enjoy the same, under the covenants and agreements in the said intended lease contained, discharged of all encumbrance done by said Isaac Foxcroft or any claiming under him.—Lord's Journ., vol. xvi, p. 644.

The remarks in White and Tudor's Leading Cases pertinent to our case are as follows :—

"The Statute of Frauds" observes Lord Redesdale "says that no action or suit shall be maintained on an agreement relating to lands, which is not in writing signed by the party to be charged with it; and yet the Court is in the daily habit of relieving where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed, as a bar to his relief. The first case (apparently) was Foxcroft v. Lyster cited 2 Vern 456, and reported in Colles' Parl. Cas. 108.

Payment of part of the consideration money is not an act of part performance so as to take a contract out of the Statute of Frauds. (See Clinan v. Cooke, 1 S and L 40.) Lord Redesdale held it not to be an act of part performance. "It has always" observed his Lordship, "been considered that the payment of money is not to be deemed part performance to take a case out of the statute." (Seagood v. Meale, Prec Ch. 560.)

Lord Redesdale's doctrine is now universally adopted, and it has even been recently laid down that the payment of all the purchase-money will not be considered an act of part performance to take a parol contract out of the Statute of Frauds. (Hughes v. Morris, 2 De Gex. Mac and G. 356.) But admission into possession having unequivocal reference to the contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an enquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure. Morphett v. Jones, 1 Swanst. 181. Borrett v. Gomeserra, Bumb. 94, &c.

Where the evidence of the parties as to the terms of the contract is in some respects contradictory, specific performance will be decreed, if the Court, by directing inquiries can collect what were the terms about which the parties differ. Thus in Mortimer v. Orchard, 2 Ves. jun. 243, where the plaintiff had built a house, his witness *proved* an agreement different from that set up by the bill, and the *answers stated an agreement* different from both. Lord Lough-

borough C. said, that in strictness, the bill ought to be dismissed, but, on account of the expenditure, decreed specific performance, according to the agreement admitted by the answers.

In Mundy v. Jolliffe, 5 My. & Cr. 177, Lord Cottenham says, Courts of Equity exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances the Court will struggle to prevent such injustice from being effected ; and with that object it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect, if it can, what the terms of it really were.

It must be always borne in mind that "part performance," to take a case out of the Statute of Frauds, always supposes a complete agreement. There can be no part performance where there is no complete agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement and by force of the agreement. Per Lord Brougham in Lady Thynne v. Earl of Glengall, 2 H L Cass 158.

The Court then is of opinion, that though the several payments made by Mr. Mantell, would not of themselves suffice to prevent the operation of the Statute of Frauds, in avoidance of the agreement now upheld, yet those payments, combined with the receipt and the amended plan, and the subsequent acts of ownership exercised by the Crown (for a piece of the land has been granted), would form sufficient ground to cause a Court of Equity to compel a specific performance, and it will be the duty of the Court, under the order of reference, to ascertain all the terms of the contract, and to make such orders as will secure the due fulfilment of them, by the Crown on one side and the Ngaitahu tribe on the other.

There is only one point remaining to which I desire to advert. Heremaia Mautai, the claimant in this case, stated that he had never consented to the sale ; had never signed the deed or receipt, and was in no way party to the contract. When pressed by the Court, as to the name of the hapu he represented, he positively declined to answer, repeating over and over again that he belonged to "Ngaitahu Katoa." It was, however, clearly proved that some of his immediate family, who claimed with him this very block, had received money and had signed documents, and were cognisant of the sale. The Court cannot recognise individual ownership of native land. The strength of the tribe, before the arrival of the British Government, was required to maintain the title of a tribe, and the land belonged to the tribe. The contrary doctrine was endeavoured to be set up by the Government in the celebrated Waitara case, but all aboriginal New Zealand *protested* against it, and a long and expensive war ensue

We cannot allow Heremaia to set up a doctrine, because now it suits his interest, against which all his fellow countrymen have so energetically protested. *Qui sentit commodum sentire debit et onus* is the maxim—and the Maori custom is, that the individual must (as regards native land) be bound by his tribe, in their external relations.

The evidences of occupation by the claimant and his ancestors all indicate that the tribe have always regarded this place as a valuable fishery. And Mr. White clearly proves that they have exercised their rights since the contract of sale. And it is quite consistent with that contract that they should have done so. And, no doubt, in acting under the order of reference, the Court will recognise the fisheries (included in the phrase mahinga kai) as the most highly prized and valuable of all their possessions.

The Court is prepared to hear further evidence as to the terms of the contract for the sale of the Ngaitahu block, and to make orders for their specific performance. In the meantime

Judgment for the Crown.

Since writing the above, I have received the *Gazette* of 1847, which confirms my recollection of the judgment of the Supreme Court, in the case of Mackintosh v. Symonds (not the Queen v. Mackintosh, as I called it).—[Christchurch.]

PORT CHALMERS RESERVE.

DUNEDIN, May 26th, 1868.

F. D. FENTON, ESQ., *Chief Judge*; and HENARE PUKUATUA, *Arawa Chief, Native Assessor.*

THIS is a claim to land comprised in the deed of cession, signed by the chiefs of the Ngaitahu tribe, commonly called "Symond's" or the "Otakou Deed," bearing date the 13th July, 1844. The deed purports to cede to William Wakefield, the agent of the New Zealand Company in London, a large tract of country in the Middle Island, and contains reservations of certain pieces of land described therein to the vendors, but has no covenant or engagement on the part of the purchaser to mark off further reserves, such as is contained in the deed called the "Ngaitahu Deed." By operation of law *(Mackintosh v. Symonds)*, the land so purchased became vested in Her Majesty; and by Letters Patent under the seal of the Colony, dated the 13th day of April, 1846, it was effectually granted to the New Zealand Company, with the exception of the pieces reserved in the original cession to Mr. Wakefield.

The New Zealand Company was established by Her Majesty's Royal Letters Patent, bearing date the 12th day of February, 1840; and obtained further powers by other Letters Patent, dated the 4th August, 1844, and by an Act of the Imperial Parliament, passed in 1846 (9 and 10 Vic., c. 382). Neither of these instruments is before the Court, nor is the statute printed in the edition of the statutes at large, in the Supreme Court Library, here.

By virtue of another Act of Parliament, passed in the same year (1846: 9 and 10 Vic., c. 103), and of Royal Letters Patent, bearing date the 23rd day of December, 1846, and Royal Instructions accompanying the same (which Letters Patent and Royal Instructions purport to have been issued by virtue of the provisions of the last-named Act), certain orders and regulations were issued and promulgated in reference (amongst other things) to the dealings with and appropriations of the demesne lands of the Crown within the Colony. These Royal Instructions contained the following provisions:—

14. "No land of and belonging to us in New Zealand shall, by us our heirs, or successors, or by any such Governor-in-Chief or other person on our behalf and on our authority, be alienated, either in perpetuity or for any definite time, either by way of grant, lease, license of occupation, or otherwise, gratuitously, nor except upon, under, and subject to the regulations hereinafter prescribed.

17. "The Governor, or Lieutenant-Governor of any such Province, with the advice of the Executive Council thereof, shall, in such charts as aforesaid, cause to be marked out and distinguished all such land situate within and forming part of the lands of the Crown, as may appear best adapted for the sites of future towns, and especially seaport towns, within the said Islands; or as the lines of internal communication, whether by roads, canals, railways, or otherwise; or as places fit to be reserved as quays, landing-places, or otherwise, for the general convenience of trade and navigation; or as places of military and naval defence; or as the sites of churches, court-houses, markets, hospitals, prisons, or other public edifices; or as cemeteries, or as places fit to be reserved for the embellishment or health of towns, or for the recreation of the inhabitants thereof, or otherwise for any purposes of public utility, *convenience or enjoyment*, in which either the whole population of the Province or *any large number of the inhabitants thereof* may have a common interest, all of which lands shall be called and be known by the name of Reserved Lands."

By an Act of the Imperial Parliament, passed in the following year (10 and 11 Vic., c. 112), the foregoing provisions were suspended within the Province of New Munster, until the 5th July, 1850, and during such further time as should be directed by Parliament, and that numbered 14 was repealed entirely by Royal Instructions, dated respectively 22nd December, 1847, 13th March, 1848, and 27th January, 1849. This Act provided that:—

"Section 2. All the demesne lands of the Crown in the Province of New Munster, and all the estate and right of Her Majesty therein, or power and authority over the same or any part thereof, should, during the suspension of the said Instructions, be absolutely and entirely vested in the New Zealand Company, in trust, for the purposes and subject to the provisions thereinafter contained; and during such period all the rights, powers, and authorities of Her Majesty in reference to the same might be exercised and administered by the said Company, subject to the restrictions thereinafter contained."

And it was further provided that if the New Zealand Company, finding themselves unable to continue their proceedings with profit to themselves and benefit to the Colony, should "give notice to one of Her Majesty's Principal Secretaries of State, within three calendar months next after the 5th day of April, 1850, by any instrument under the seal of the Company, that they were ready to surrender the charters of the said Company to Her Majesty, all claim and title to the lands granted or awarded to them in the Colony, all the powers and privileges of the Company, except such as should be necessary for enabling the Directors to receive certain sums of money, and to distribute the same among the shareholders and other persons entitled thereunto, and for enabling the Directors to adjust *and close* the affairs of the Company, should cease and determine, *and all the lands, tenements,* and hereditaments of the said Com-

pany, in the said Colony, should thereupon revert to and become vested in Her Majesty, as part of the demesne lands of the Crown in New Zealand, subject, nevertheless, to any contracts then subsisting in regard to any of the said lands."

And by Section 3 (relied upon by Mr. Haggitt), it is provided that it should not be lawful for the Company to sell or dispose of any of the lands thereby vested in them (other than and except such lands as might by the said Company be granted or conveyed in trust for, or be dedicated to, public purposes or uses), without consideration, or for any less consideration than the sum of 20s. for each acre.

In or about the year 1845, a number of persons, lay members of the Free Church of Scotland, associated themselves, as reported by the General Assembly, of May, 1845, into a Society called the Otago Association. This Society entered into a certain contract with the New Zealand Company (not produced before the Court), the object of which appears to have been to enable the Association to colonise a certain part of the Colony, comprising 144,600 acres of land, and including the land now under investigation. The Association issued regulations, or "terms of purchase," as they are called, on the 14th May and 24th November, 1847, and others on the 13th April, 1848, for all of which other regulations were substituted by the New Zealand Company on 1st August, 1849, by order of the Court of Directors. By these regulations, the prices of land were fixed, and it was provided that these prices should be charged on the estate of the Municipal Government, of the trustees for religious or educational uses, and of the New Zealand Company, in the same manner as on the 2,000 properties intended for sale to private individuals. Clause 11 provided that reservations should be made, so far as practicable, of the sites of villages and towns, with suburban allotments adjacent, in the several parishes and hundreds, which were to be laid out in accordance with the Government regulations on this head.

It was stated by Mr. Haggitt in his argument, and by Mr. Cutten in his evidence—though not in any way satisfactorily proved to the Court—that under this provision, or under some provision contained in the previous terms of purchase, the piece of land which is without a number, included in the claim, was set apart and reserved as a town belt, or public reserve, for the citizens of Port Chalmers and the public generally. As this statement was not disputed by the Crown, nor by the claimants, the Court will for the present assume this land to have been duly constituted a public reserve up to the year 1850, when the New Zealand Company expired.

Parliament made no such further direction as is referred to in the Act 10 and 11 Vic., c. 112, and therefore the Royal Instructions previously mentioned as having been suspended by that Act in the Province of New Munster, revived and came into force again on the 5th July, 1850.

The directors of the New Zealand Company, on the 5th day of July, 1850, gave to the Right Honourable Earl Grey, Principal Secretary of State for the Colonies, notice, in pursuance of the abr

quoted provisions of the Act 10 and 11 Vic., c. 112, that they were unable to continue their undertaking; and consequently all the lands, tenements, and hereditaments of the Company in New Zealand reverted to, and became vested in, Her Majesty as part of the demesne lands of the Crown in New Zealand, subject, nevertheless, as aforesaid, to any contracts which were then subsisting in regard to any of the said lands.

Royal Instructions, dated the 12th August, 1850, after reciting (amongst other things) the existence of these contracts, revoked and determined so much and such part only of the thirteenth chapter of the said instructions as relates to the lands comprised in, or affected by, the aforesaid contracts between the New Zealand Company and the settlers at Wellington, Nelson, and New Plymouth, and the Associations of Otago and Canterbury, and so far as the same might be inconsistent with the said contracts respectively, or any part thereof. And Her Majesty declared that the said contracts respectively, or any amendments in such contracts which might thereafter be made, by and between Her Majesty, or parties on her behalf, lawfully authorised, and the said bodies respectively, should be in force as regards the lands comprised in or affected by the said contracts.

On the 8th August, 1851, Lord Grey, a Principal Secretary of State, forwarded to Governor Grey a copy of an Act passed by the Imperial Parliament, in consequence of the demise of the New Zealand Company, entituled "An Act to regulate the affairs of certain settlements established by the New Zealand Company in New Zealand," 14 and 15 Vic., cap. 86. In this despatch Lord Grey says: "This Act has by no means determined all the questions that may arise with respect to these settlements in so satisfactory a manner as I could have wished. But inasmuch as the terms of purchase were held by the law advisers of the Crown to be binding on Her Majesty as contracts of the New Zealand Company, Her Majesty's Government did not consider it to be competent to them to get rid, as fully as might perhaps have been desirable for all parties, of the impediments to uniformity of management of the Crown Lands of the Colony which these contracts create, without the assent of the other parties to the contracts—namely, the land purchasers, which at this distance it was impossible to secure." We accordingly find that the Act makes no provision whatever for those parts of the New Zealand Company's settlements which are affected by the contracts of the Canterbury or Otago Associations, except that contained in Section 11:—"Henceforth, in all cases falling within the provisions of the fifty-first section of an Act of the ninth and tenth Victoria, entitled 'An Act to grant certain powers to the New Zealand Company,' a grant or conveyance by Her Majesty, her successors, or assigns, shall have the force and effect in all respects as a conveyance by the New *Zealand Company has,* or would have had, by virtue of the same *Act, in case no such notice* as aforesaid had been given, and the said

Company had continued in the full exercise of their functions; and the powers by the same Act in reference to those cases conferred on a nominee or nominees of the said Company, approved of as therein mentioned, shall henceforth be exercisable by such person or persons as the Governor or Lieutenant-Governor for the time being of New Zealand may from time to time appoint; and also all acts done in pursuance of any such several powers by the party or parties for the time being entrusted with the execution thereof, shall be binding on Her Majesty, her successors, and assigns." Now, this Act, apparently a long and important Act, is the one to which I have previously referred as not being accessible here. It is the 9 and 10 Vic., cap. 382, of which the title only is printed in the Statutes at large. It is impossible, therefore, to say what the effect of the above enactment may be.

In the year 1852, the Act 15 and 16 Vic., cap. 72, commonly called the Constitution Act, was passed. By this Act, power was given to Her Majesty to make provision, by way of regulations to be contained in any charter to be granted to the Otago Association for the disposal of the lands to which the terms of purchase relate so far as the same are still in force, and for varying from time to time such regulations, with such consent of the Association, as in such Charter should be signified. And power was given to Her Majesty to delegate this and other powers to the Governor.

By Letters Patent, made at Westminster on the 13th day of September, 1852, being a new Commission to Governor Sir G. Grey, his previous Commission, and the previously recited instructions, were revoked, and the instructions of 1846 were set up again, and were to remain vested in, and be exercised by him as fully and effectively as if the same were set forth and specially granted to him in these Letters Patent: Provided that none of the powers, instructions, and authorities so renewed and granted should be repugnant to the Constitution Act.

Instructions from Sir J. Pakington to Governor Grey, dated 15th December, 1852, contain the following reference to the Otago Association;—"You will observe that although the terms of purchase of the Otago Settlement have now expired, by reason of the Association's inability to sell the stipulated quantity of land; and although the legal control over the land has consequently devolved on Her Majesty, under the provisions of the Constitutional Act (as to which I refer you to my despatch of even date herewith, respecting the Canterbury Association), it has nevertheless been thought by Her Majesty's Government advisable that the land should continue to be administered in general conformity with the terms hitherto subsisting until the General Assembly shall otherwise determine."

It has not been suggested that any action was taken by the General Assembly, altering the legal or equitable status of the land claimed, or its legislative position previously to its being set apart, as alleged, for a Native Reserve.

I have thus briefly glanced at the legislation, original and under delegated powers, affecting this land, which has been brought under the notice of the Court by the several counsel, or which I have been able to discover with the limited means of information at the disposal of the Court here. Besides the Act to which I have referred, I can, in the Gazettes and elsewhere, see traces of instructions from Secretaries of State, and correspondence with the New Zealand Company, which would doubtless have important bearings on our case; but not being able to obtain these documents, and being under the necessity of arriving at some decision, the Court must arrive at the best judgment it can on the facts placed before it by the parties.

The whole of the pieces of land comprised in this claim are clearly and indisputably at the present time vested in Her Majesty. But their position before this Court is at present various, though originally they were all fixed by Mr. Mantell—then Crown Lands Commissioner—as Native Reserves, by the direction of Sir. G. Grey, then Governor. Sec. 401 had been sold, but not granted, to a Mr. Williams, and, on Mr. Mantell's recommendation, was purchased by the Government from that gentleman for the purposes of this Reserve, and a conveyance to Her Majesty has been taken from him, so that there is no question affecting this section.

Sec. 402 is alleged by the Presbyterian Church to have been lawfully reserved for them, previously to the reservation for the natives; and as their case is not yet closed, this section will not be included in this judgment.

Sec. 403 and Sec. 404 are sections marked off on the original plan, and in the allotment book, as open for selection. They were never selected, and remained open and without encumbrance to the present day, except, of course, the alleged reservation as a Native Reserve.

The other parcel unnumbered is alleged and admitted to be part of the Town Belt; but whether it was ever effectually and legally made a public reserve has not been shown to the Court.

The Native Lands Court has no jurisdiction over demesne lands of the Crown, or granted lands, except under the Act of last session (Native Lands Act, 1867). The provision governing the whole of these proceedings, and creating our jurisdiction, is contained in the 11th clause, which is as follows (so far as concerns our case):—

"11. In the interpretation and construction of the provisions of this Act, the expressions 'Native Reserve' and 'Native Reserves' shall mean and include any land in the Colony of New Zealand which falls within one or other of the following descriptions:—

"'(5.) Lands appropriated by the Governor for the use or benefit of any aboriginal Natives.'"

And the Act provides that in cases where, under this Act, the Court would not have had jurisdiction, it shall be competent to the Court to inquire into and determine any question affecting any title *to, or interest in, any* Native Reserve which may be referred to it by *the Governor.*

As to Section 401, there being no objection on the part of any person to the native claim, the judgment of the Court is that a Crown grant of Section 401, Port Chalmers, ought to issue to Horomona Pohio, Hoani Wetere Korako, Hori Kerei Taiaroa, and Hone Topi Patuki, and their successors, appointed under the Native Land Act, 1865, in trust for all the members of their tribe (Ngaitahu) who are now, or may be hereafter, resident south of and including Kaiapoi, in the Province of Canterbury: that the estate granted should be absolutely inalienable for ever, except by lease for a term not exceeding 15 years, or for the purpose of settlement, for the benefit of the persons interested, or their successors appointed as aforesaid.

As to secs. 403 and 404, the Counsel for the Crown assents to the claim, but Mr. Haggitt, on behalf of the Superintendent, objects, and alleges that a stockyard had been built on the place by him, and that he was in actual possession. There was no proof whatever placed before the Court to substantiate this allegation. The facts of the case are as follows:—The two sections were duly marked on the "Selection" plan, and entered in the "Allotment Book." They remained unselected until 1853, when Mr. Mantell, by direction of the Governor, chose them for part of a Native Reserve, and marked them off in the book as such, informed the natives that he had done so, and made a communication to the Governor, with a plan included, requesting his approval of his selection. On the 15th June, 1855, the following letter was addressed by the Colonial Secretary to Acting Commissioner of Crown Lands, Otago (Mr. Proudfoot):—

Colonial Secretary's Office,
Auckland, 5th June, 1855.

SIR,—In accordance with the request contained in Mr. Commissioner *Mantell's* letter of the 4th December last, I have the honour to enclose herewith certified plans of Native Reserves at Dunedin and Port Chalmers, as enclosed in his letter of the 18th April, 1853, to the Civil Secretary, in order that they may be duly recorded, as approved by His Excellency.

I have, etc.,

(Signed) ANDREW SINCLAIR,
Colonial Secretary.

The Acting Commissioner of Crown Lands, Otago.

The Governor in Council recognised and acted upon this engagement; for, in 1865, we find an Order in Council, made under the Native Reserves Acts, appointing Mr. Strode a Commissioner to administer the Port Chalmers Reserve, and the evidence is clear that there was at the time no other Native Reserve at Port Chalmers, except the one now before the Court; and it was proved in evidence by Mr. Cutten that the Provincial Government, a local branch of the Government of the Colony, had undertaken to pay rent to Mr. Strode as tenants of the place, though it was not shown that they had ever paid any. These facts constitute a very strong case; and, in the judgment of the Court, no grounds whatever have been shown to

justify the Court in saying that the Governor was not justified in doing what he has done. It is not necessary to enter minutely into the question of authority, especially when the Acts done are done by the Government, until the *primâ facie* case has been upset, for the rule is *omnia bene et ritè acta præsumuntur donec probetur in contrarium.* Moreover, in my judgment, the power given to the Governor by the 11th clause of the Waste Lands Act, 1858, was expressly conferred to enable him to protect the honour of the Crown in cases of this sort. That provision is in the following words:—"And whereas it is proper and expedient that power should be given to the Governor to fulfil engagements heretofore made on behalf of Her Majesty, and also to make Reserves for certain public purposes within the Colony: Be it therefore further enacted that it shall be lawful for the Governor at any time to fulfil and pérform any contract, promise, or engagement heretofore made by or on behalf of Her Majesty, and whereof there is evidence in writing, with respect to any allotment or parcel of land within the Colony, and any Crown grant made in pursuance of any such contract, promise, or engagement, shall be valid."

Even if grave doubts had been created by the opponents as to the authority of the Governor to set apart this land for the natives, the Court would still have felt itself compelled to say that this reservation is a contract, promise, or engagement, coming completely within the terms of the Waste Lands Act, 1858, which the Crown is bound to fulfil.

The judgment of the Court therefore is, that a Crown grant of secs. 403 and 404 of the Town of Port Chalmers ought to issue to Horomona Pohio, Hoani Wetere Koraka, Hori Kerei Taiaroa, Hone Topi Patuki, and their successors, appointed under the Native Land Act, 1865, in trust for all those members of the tribe Ngaitahu, who are now, or may be hereafter, resident south of, and including Kaiapoi, in the Province of Canterbury: that the estate granted should be absolutely inalienable for ever, except by lease for a term not exceeding 15 years, or for the purposes of settlement for the benefit of the persons interested, or their successors appointed as aforesaid.

As to the unnumbered piece—parcel of the Town Belt—the Superintendent is the possible grantee of this piece of land under the Public Reserves Act; that is to say, that will be his position if the Town Belt of Port Chalmers has been legally and validly reserved. But, as before stated, no sufficient proof has been given to the Court that this has been done. But assuming, for the purpose of this case, that the power of making this reserve has been well executed by the proper authority, in the judgment of the Court the *primâ facie* case established by the claimants has been upset. The argument of Mr. Macassey as to the effect upon the Crown of the terms of purchase of the Otago Association, and of the other contracts to which it succeeded as inheritor of the lands and obligations of the New Zealand Com-

pany, was very able, but is one that the Court cannot sanction. The dedication of the Town Belt would (if validly done) undoubtedly form part of the contract with the purchasers of land in Port Chalmers, and Mr. Macassey has not shown, and the Court has failed to discover any power in the Governor to alter a reserve once validly made, or to change its objects and purposes. All the Statutes and Royal Instructions which have been quoted appear to be clear in these particulars—viz., that the Governor, New Zealand Company, or Otago Association (subject or not to approval of higher authority), might make reserves for public purposes; that the lands sold were sold on the faith of these reserves having been or having to be made; and that no power existed afterwards to divert them from such purposes. This would appear to be a principle of simple fairness, and very clear provision would be required to constrain a Court of Justice to refuse to recognise and interpret it. There is no doubt that the Governor, and the Governor-in-Council, and the Commissioner of Crown Lands, subsequently did all they could to make this land a Native Reserve, but it was, on the above assumption, too late. *Qui prior tempore potior est jure* is the maxim. And this clear principle of justice was strongly, though almost unnecessarily, affirmed in the legislation of the General Assembly on the subject of Native Reserves.

The Native Reserves Act, 1856, says:—

"Nothing in this Act contained shall have the effect of removing any invalidity or curing any defect in any grant or other conveyance made or issued before the passing of this Act, under which any lands may have been granted or assured to any person or persons for religious, charitable, or educational purposes for the benefit of the aboriginal inhabitants: Provided also that nothing in this Act contained shall extend, or be implied to extend, to give validity to any appropriation or setting apart of any lands for such puposes as aforesaid, which have been heretofore so appropriated or set apart in contravention of any terms of purchase, or contracts affecting such land."

Nor would the fact that the Governor was made aware at the time that this land was part of the Town Belt alter the legal position of the question, for the Governor has, and legally exercises, only such powers as are conferred upon him by the Acts of the local Parliament, or Acts of the Imperial Parliament, or Letters Patent, or Instructions issued to him under the authority of Imperial Acts. He has no original authority (Hill *v.* Bigge, Moore, Priv. C. Rep.), nor is it competent to him to make grants *ex certâ scientiâ et mero motu*, in the ancient signification of that phrase, as might have been done at one time by the Crown in England. The lands of the Colony can be dealt with by the Governor, as by all inferior officers, in manner provided by the written law, and in no other manner.

Nor do I think that the before-quoted clause of the Waste Lands Act, 1858, ought to apply to a case of this character. The provision or engagement made by the Governor was not, in my judgment, one

within the contemplation of the framers of that provision; and if a grant were issued, and the proceeding of *sci. fa.* were taken to repeal it, I think that it could not be maintained, but would fail as being, in the technical phrase, "in deceit of the Crown," prior and permanent equities and interests existing, supposing, as I have assumed, that the land has been legally dedicated. The Court is, therefore, of opinion that it cannot order a grant to the claimants of such part of this Native Reserve as is comprised within the Town Belt of Port Chalmers. It is scarcely necessary to repeat that this decision is given on the assumption that the Town Belt was well and effectually set apart. As before remarked, this legal dedication has not been proved to the Court; but in all probability it is capable of proof. The Court, therefore, will for the present refrain from making any final decision, but will leave it open for the opponents or claimants respectively, after three days' notice to the other side to move the Court, at a future sitting, to dismiss the case, on production of the deficient evidence, or to order a grant in default of such evidence being produced.

ORAKEI.

AUCKLAND, December 22nd, 1869.

F. D. FENTON, ESQ., *Chief Judge;* HENARE PUKUATUA, *Arawa Chief, Native Assessor.*

(INTERLOCUTORY.)

THIS is a case in which Apihai te Kawau, on behalf of himself and the members of the tribes Te Taou, Ngaoho, and Te Uringutu, claims a certificate of title to an estate at Okahu, on the shores of the Waitemata, containing about 700 acres.

Heteraka Takapuna, on behalf of himself, as a remnant of the ancient possessors of this isthmus, and on behalf of himself and the tribes Ngatipaoa, Ngatimaru, Ngatiwhanaunga and Ngatitamatera, appears as a counter claimant.

Hori Tauroa, on behalf of himself, Ahipene Kaihau, and Matene Raketonga, members of the tribe Ngatiteata, appears as a co-claimant, not denying the title of the claimants, but asserting a right to come in along with them, through ancestral relationship and occupation.

Paora te Iwi, of the tribe Ngatitamaoho, sets up a similar right on behalf of himself.

Wiremu te Wheoro, of the Waikato tribe Ngatinaho, and Hawira *Maki,* of the tribe Ngatipou, assert similar rights on behalf of themselves.

All the counter-claimants seek only for a partition and a share in the estate along with the claimants, except Heteraka Takapuna, who denies the title of any person except himself and those who claim under or with him, though this extreme position was not taken by his counsel.

I will here mention that I propose to use the name of Orakei or of Okahu as applying (generally) to the whole estate; the smaller names, such as Wakatakataka, although necessarily used in the evidence, may be dropped in this judgment.

I intend also generally to use the first person in expressing the opinion of the Court, simply for convenience of diction, but I should add that in all points the Assessor entirely concurs with me. It is desirable also that counsel should be made aware that he understood their addresses as they were delivered in English, although, as he expressed himself, he would not have been able to reply to them in that language.

There are a few points brought under the notice of the Court by the several counsel which I will notice here before proceeding to treat the merits of the case itself.

1. It was with great regret that I observed that Hori Tauroa, who sat as an assessor in the previous case, where the parties were substantially the same, appeared as a claimant in this. Nothing can be more objectionable, and more repugnant to proper sentiment, than that an interested person should sit as an administrator of justice. Of course, such conduct cannot pass unnoticed, and it will be my duty to ask the Government to advise His Excellency to remove Tauroa from the list of Assessors. But although the confidence of parties must necessarily be shaken in the decision which was given in the previous trial, it does not appear to me that the present proceedings can be in any way impeached by this malfeasance. Of course, he now comes before the Court with an antecedent prepossession in my mind against his perfect integrity—a prepossession confirmed by a passage in his own evidence, where he says, "Heteraka's claim is as good as mine," although he decided against it, and now urges his own.

2. Many references were made by witnesses as to the doings of Captain Symonds, principally for the purpose of fixing dates. As it appeared in the course of the case that there were two gentlemen answering to this description who were not often distinguished by the witnesses, the Court is deprived of the assistance which it might have derived from the known and attested facts connected with them which it might have obtained if the Christian names of each had had been known and given.

3. The learned counsel for Heteraka drew my attention to an inconvenience—a hardship, in fact, as he put it—under which he felt himself to be labouring by the rule of Court which regulates the course of proceedings. I have given the subject some consideration, and cannot convince myself that there would be in reality any injustice in a rule which would in fact merely give the person in possession the advantage of being in the position of a defendant in an action of ejectment in the Supreme Court. But Mr. Gillies thinks that the rule goes further than that, especially in the matter of addresses of counsel to the Court. It was not in the power of the Court to alter it, and I do not think, however, that any substantial failure of justice has taken place in this case from this cause, for after the lengthened inquiry that has taken place, and the very complete manner in which the cases on all sides were placed before the Court, I cannot suppose that any alteration in the course of proceedings would have affected the result.

4. Much time was occupied in cross-examination, the object of which at the time it was difficult to perceive. For instance, Mr. Hesketh used much labour and great skill in endeavouring to upset Apihai's alleged possession from dates anterior to the coming of the first Governor; and Mr. Mackay, in Mr. Gillies' absence, cross-examined at considerable length, to prove or disprove *descents from* Potukeka, also induced the Court to recall a witness *for the purpose of showing* the political status of a rahi or pahi, and *the distinction between* them and common mokai or slaves. I did

not interrupt these gentlemen, trusting in perfect faith that they would show the Court, when the proper time came, how their own cases would be furthered by the course which they were taking. But this was not done, and the Court feels that if Mr. Hesketh had succeeded in upsetting Apihai's claim he would in so doing, as Mr. Gillies observed in his opening address, have only produced the effect of entirely destroying his own case; and the matters referred to, as inquired into by Mr. Mackay, appear to have been irrelevant. I may add that I am quite at a loss to discover what bearing the history of the mere pounamu called "Kahotea," which was investigated by Mr. MacCormick, can possibly have in this case. I merely mention these matters, as involving a painful waste of time.

5. There remains one more question for notice by the Court—viz., the appearance of Mr. Mackay, a Civil Commissioner, as agent for one of the parties in this suit. At the first sitting of the Court, Mr. Gillies applied for an adjournment on the ground that Mr. Mackay, who was instructing him, was absent, unavoidably detained at the Thames by important Government affairs, and said that he would be entirely unable to do justice to his clients in Mr. Mackay's absence, and urged for an adjournment. On Mr. MacCormick opposing the adjournment, Mr. Gillies stated that, if the Court determined to proceed, his clients would be placed in such a disadvantageous position that he should consider it his duty to ask for a re-hearing. The Court was of opinion that, if a re-hearing were asked for, supported by the authority of Mr. Mackay, it would in all probability be granted; and such a result appeared to be so unfortunate, not only as regards the great loss of time and expenditure of money, but also as leaving this agitating question for some time longer unsettled, that the Court thought the wisest course, and the *most* advantageous one for all parties under such circumstances, was *that* the adjournment should be granted.

At a subsequent stage of the proceedings, when Mr. Mackay was called as a witness, chiefly, as it appeared to the Court, to give Mr. MacCormick an opportunity of asking him any questions he might wish, that gentleman objected to his appearing, and argued on the ground of privilege. The Court decided that the privilege was with Mr. Mackay, and not with the suitors, that if he, called as a witness, stated on his oath that his giving evidence or producing papers would be prejudicial to the public service, the Court had no power to compel him to answer, but that the discretion to plead the privilege was with himself. In his concluding address to the Court, Mr. MacCormick referred in a very earnest manner to the disadvantages under which he felt himself to be labouring by reason of Mr. Mackay's appearance. He said that a Civil Commissioner, or any officer of the Government, had no moral right to use in a private suit communications made to him in confidence as a public officer; that such a course must be highly prejudicial to the Government, as tending to destroy the trust which should exist between the natives and officers of the Crown, especially officers purely charged with the

management of native affairs. And he added that my mind was affected, by his presence as I had already shown by granting the adjournment; and although he felt sure that my judgment would not be influenced, he could not have the same confidence with respect to the Assessor, who was in constant communication with Mr. Mackay, and looked to him as his superior officer, with power to influence his advancement or prejudice his future position.

It does not appear to me that the Court has any concern with the relations which exist, or may exist, between Mr. Mackay and the Government, or between the natives and Mr. Mackay as an agent of the Government; nor can Mr. MacCormick have anything to complain of, unless—

(1.) Mr. Mackay has disclosed matters entrusted to him in confidence by virtue of his position, to the prejudice of Mr. MacCormick's clients; or—

(2.) That the conduct of the Court is influenced by his presence or affected by his interference in this private suit.

The first is not alleged. The second was hinted at as far as concerns myself, and broadly stated as far as the Assessor is concerned. Now, I am inclined to think that Mr. Gillies' view of human nature as it is found among Englishmen is the more correct one. He appealed to the Court not to be too jealous about the appearance of the Crown officer on the side of his clients; not, in fact, to keep too strict a guard against Executive influence, lest we should err on the other side; but to decide as if there were no such person as Mr. Mackay present. The letter of the Native Minister to a Judge of this Court, to which Mr. MacCormick referred, has not, so far as my knowledge extends, in any way influenced, nor is likely to influence, the conduct of any Judge of this Court, and I cannot discover any grounds for entertaining the apprehension which Mr. MacCormick has expressed. Mr. Gillies read our common nature more truly. But there is another point of view to which I wish to direct the attention of parties and their counsel, with reference to Mr. Mackay's appearance and evidence. I gathered from his evidence that his clients were very powerful tribes, that they were excited about this contest, and that he had on the previous occasion of an adverse decision, restrained them from any excesses, and would endeavour, in case of another, to do so again. Now, without for a moment supposing that this information was intended as a menace to the Court, it struck me at the time that Mr. Mackay did not appear to have contemplated a decision adverse to the other side, which represents tribes, with their allies at Kaipara, Hokianga, and Waikato, equally powerful, and, possibly, equally excited. His influence could avail little with them, for they would regard him as a friend of their opponents, and a prime agent in their discomfiture.

Now, when I remember how, at a previous sitting of this Court, Ngatipaoa, his present clients, were defeated in a claim they made to *land on the other side of* Tamaki, and how effectively Mr. Mackay

stepped in and made an arrangement which healed their wounded feelings, and made them part from their victorious competitors in perfect amity; and when I think of the great services he has rendered to this Court on other occasions when he occupied an impartial and, consequently, an influential position, I cannot but regret that on this occasion the Court cannot rely with the same confidence upon the efficacy of his intervention, for there are three parties to satisfy, and the decision must necessarily afford disappointment and loss to some of them.

Therefore, although I do not think Mr. McCormick suffers by this intromission, and the Court has not been "overshadowed by the Crown," yet I cannot conceal from myself that the Court is not in the position it ought to occupy with reference to the Executive Government; and intimately concerned as its proceedings are, and unavoidably must be, with the peace of the country, my present mind is, that I (speaking as an individual Judge of the Court), shall decline in future to proceed with any case in which the Crown's officer appears, either with or without reward, as assisting either of the suitors.

The case has presented unusual difficulties, or rather the great value of the property has caused so much care and attention to be devoted to the preparation of the cases, that an appearance of intricacy and complication has been given to transactions which, in themselves, are clear and intelligible.

When once the history of the case is understood, and those passages which really have no bearing on the questions to be decided are eliminated from the evidence, the great principles which have governed this Court in determining Maori custom, or the laws of native ownership of lands, will suffice to guide us to a safe decision as to the effect of what remains.

The history of this estate is very much mixed up with the history of this isthmus, and that again is almost an epitome of the history of New Zealand during many years, for this was the highway of the armies of the tribes in old days; and whether going North or South, all war parties passed through or touched at Tamaki.

For the sake of brevity and convenience, I have condensed this part of the question into the form of a historical chronology, and I have spent much time in preparing this statement in order that the judgment might be as short as possible. I cannot expect that all the dates and statements contained in this paper will be acknowledged as absolutely accurate, but I have got the best results I could from conflicting evidence, and in places where the statements seem to be contrary to some particular evidence, it must not be supposed that I have not noticed that evidence, but that I have preferred some other to it.

The land about this isthmus appears to have gone in early days under the general name of Tamaki, though that name is now confined to the river so called and a limited district adjoining it. In early times, the part of New Zealand comprised between lines drawn from Cape

Rodney across to the West Coast, and from Waikato to Tauranga, were in the possession of one great tribe, called, from their ancestor Oho, Ngaoho. As the tribe increased, it seems to have divided itself, without any express compact or arrangement, but simply by the gradual operation of ordinary causes, into sections, and these sections in the same unmarked and gradual manner became the possessors or persons especially entitled to reside in particular and partially defined sections of the original great tribal estate. These sections of the Ngaoho came to be distinguished by names taken or acquired from different origins. Those which have been brought to notice in this trial are Ngariki, Ngaiwi, and Ngaoho. Ngariki inhabited chiefly the land about and to the south of Papakura, Ngaiwi the interval between Papakura and the waters of Waitemata, and Ngaoho to the north of Waitemata, in the direction of Kaipara. At a later period Ngaiwi divided itself again into Ngaiwi and Te Waiohua, and a species of half-recognised boundary seems at a still later period to have existed between them at the canoe portage of Otahuhu, half of the peninsula of Mangere and Ihumatao being attached to the northerly subdivision. I do not think that this territorial division was ever distinctly laid down and agreed to, but there was a sort of understanding that that portion of the tribe who looked up to Hua (the origin of the name), who lived at Mangakiekie (One-tree Hill) and Mangere, and who inhabited the country around that place, should continue to live there, and should be called Waiohua, and those who remained in the southern part of the district should continue to be called after their ancestor Ngaiwi. But the names never had any definite meaning, and a person was still described by both names, or by either of them indiscriminately, and the territorial understanding carried no evidence of "ownership," for, in these days, the idea of ownership of land, or of anything else, except slaves and other movable property, did not exist.

As these original tribes became mixed up with intruding tribes, new names arose, such as Te Aua, Te Akitai, and many others, and the long inhabiting a particular piece of land by a particular tribe gradually grew into a right of possession, which was recognised as long as the tribe was strong enough to protect their persons from hostile attack without fleeing from the land to the protection of other tribes, or to the concealment of the mountains.

Thus at the opening of our history we find that the part of the Tamaki district to the north of Otahuhu portage, including part of the Mangere peninsula, was inhabited by a tribe called Waiohua generally, but still bearing the name of Ngaiwi. The northern section of the Ngaoho, who seem to have retained their original name, were at the same time gradually amalgamating at Kaipara with a conquering tribe from the North, called Ngaririki, subsequently called Te Taou, and the original name of Ngaoho disappeared in favour of the name of the intruders. At a later period (detailed hereafter) when *Te Taou invaded* this country and conquered the Waiohua, their *chiefs intermarried with* the women of the land; and their offspring,

at the suggestion of Awarua, one of the chief of them, revived the old name of the original tribe, and the doubly-mixed race appear again as Ngaoho—being, in fact, Ngaoho the Second. Others of the remnants of the nearly exterminated people of Tamaki gradually returned from their concealment, or the abodes of the Waikato tribes, whither they had fled for protection at the time of the conquest, were received into the conquerors' tribes now resident, and this "collection of remnants," as one of the witnesses called them, received the name of Te Uringutu. Apihai Te Kawau, by intermarriages of his ancestors on all sides, is now the chief these three tribes, Te Taohu, Ngaoho (the Second), and Te Uringutu, and on their behalf is the claimant in this suit. The pure Te Taou, *i.e.*, the descendants of the Kaipara tribe Ngaririki, from their intermarriages with the original Ngaoho (Ngaoho No. 1), have a chief of their own (Tautari), and are not altogether without jealousy of Paul and other descendants of the mixture with Ngaoho No. 2, but they look up to Apihai as their head chief, for he is, as Sir Walter Scott describes a Highland chief, "the man of many cousins."

The Ngatiteata and Ngatitamaoho, Ngatiuaho, and Ngatipou, are inhabitants of the southern or western sides of Manukau, and the result of intermarriages of Waikato tribes with the southern portion of the great original tribe Ngaoho. The Waikatos intruded from the South in precisely the same manner, though at different periods, as the Taou did from the North, though in my judgment Maki and Ngatipou would be more fitly included amongst the Uringutu than in tribes that have come to be regarded as almost purely Waikato.

Heteraka Takapuna is a member of three tribes, Ngatitai, Ngatikahu, and Ngatipoataniwha, and claims also to be descended from the Waiohua; and whether this claim is made out, or whether he and his co-claimants (the Thames tribes) have, by their ancestors or themselves, ever intruded themselves into this country is one of the principal subjects of this inquiry.

PEDIGREES.

It will be at once apparent that the pedigrees of the suitors will be a matter of great importance in determining the questions arising in this trial. Mr. Gillies expresses an entire disbelief in them; thinks that they are of no value, and, in fact, neither genuine nor authentic, but are made up or compiled for each case as it comes on. Now, it is obvious that the Court must express a decided opinion on this question generally, for it has been largely imported into the evidence of many of the witnesses.

This Court has no common law to direct its steps by; in fact it has by its own operations to make its common law, and to establish "year-books" which may in the course of time afford a code of law to which appeal may be made for guidance in deciding all questions which may come before it. And it has been the practice of this Court hitherto to inquire into pedigrees, giving them such weight

as they seemed entitled to from their intrinsic merits in each case. The general principle which should govern the Court as to pedigrees was laid down in a previous case;—"They must be received, not for the purpose of deciding tribal estates, but for the purpose of determining members of tribes." It is, no doubt, almost beyond the powers of members of a civilised race, who, possessing written documents, are not required, and are little accustomed to trust facts of importance to their memories, to believe that any person can remember from tradition a whole family, with all its branches, for twenty or even ten generations back; but, in my experience as a Judge of this Court, I have received pedigrees which I have compared with pedigrees given sometimes by the same witness, sometimes by others, at other Courts, at distant periods of time, and have found the general concord perfectly astonishing. Now it appears to me that, if the natives generally admit these pedigrees—and themselves largely found on them their right as members of a tribe to join in the tribal estate—it is strictly according to native custom that this Court should entertain them as aids in discovering the owners of properties; of course, subject in all cases to the more visible and important facts of occupation or possession. Even if these pedigrees are all "a mass of invention," and the names therein are purely fictitious, their general value is not in my judgment affected, if all natives agree to have their claims, to a certain extent, decided by them. The reception of them, under such circumstances, has not only convenience to recommend it, but safety also, and the knowledge that in so doing the Court is best consulting native feelings or prejudices, and native manners, and consequently is best interpreting "Maori custom." In our case all the parties put in pedigrees, Mr. Hesketh almost entirely relying upon them, for the acts of ownership or occupation proved by his witnesses were (with one exception) of a very trivial character; and Mr. Gillies' client (Heteraka Takapuna) made three starts at his pedigree to connect himself and his friends with Waiohua, and evidently felt so anxious about the question that at the close of the case he made an application to be re-called, in order to put in another.

The Court does not therefore propose to depart from its precedents, but will, for the purpose laid down in previous Courts, give such weight to the pedigrees as it thinks each is entitled to. And I may here state that, after much investigation and thought, I have not discovered any reason why any of them should be discredited—several little discrepancies, such as putting down Huakaiwaka as a woman and speaking afterwards of him as a man, not to my mind affording any ground for supposing that a person of that name never really existed, or for doubt whether he or she really occupied the allotted place in the pedigree.

I have, from the evidence, drawn out the pedigrees attached hereto, and will, in this judgment, allude to them hereafter when *necessary, as evidence.*

KAPETAWA'S CONQUEST.

Heteraka Takapuna founds his title and that of his co-claimants, the Ngatipaoa and other Thames tribes, partly on Waiohua ancestry (to be noticed hereafter), and partly on a conquest made by their ancestor in days long gone by. He says, "Kapetawa is the ancestor to whom this land belonged." This is the only conquest alleged by them; and it will, therefore, be proper to inquire into it particularly. Counting back by generations this conquering ancestor (Kapetawa) must have been contemporary with Hua, the Ngaiwi chief, who lived at One-tree Hill and Mangere, and as the name Waiohua then had its commencement, this part of the country must have been pretty thickly peopled. Indeed, when one looks at the enormous earthworks surrounding Mount Eden, One-tree Hill, and all the volcanic hills of this district, and recollects the character of the tools with which they were constructed, there can be no doubt that the people who built them can neither have been few in numbers nor sparsely settled. The same people seem also to have occupied Waiheke and the islands of the Gulf, and possibly down the shores of the Waitemata to the Firth of the Thames. At this time the Thames tribes seem to have been living on the Firth of the Thames and up the Thames Valley to Horotiu and Rangiawhia, and perhaps further west and south—for Hoterene Taipari told us that the ancestors of those tribes, Marutuahu (whence the name Ngatimaru), lived at Kawhia, whence they worked their way across the Waipa and Waikato plains, and ultimately down the Thames and Piako; and then gradually spread eastward and northward .At a later period of their history we find them living at Mangatautari, and we have many witnesses who tell us of their final expulsion from the Waikato Valley by Waikato, under Te Waharoa and Potatau. And Taipari adds:—"At this time Te Waiohua owned all this land. We Ngatimaru were on lands that did not belong to us. We were living south of Kauaeranga, on the lands of Ngatihuarere and Ngatikorowhai." And Heteraka stated that the pa at Orakei captured by Kapetawa was built by Ngatihuarere. Possibly the two events may have some connection with each other. At the time of this conquest, then, some of the Thames tribes were living at Hauraki, near the mouth of the Thames. The cause of the war was as follows:—About seven generations ago, Tarakumikumi, a man who is alleged to be a Waiohua, though somewhat unaccountably his brother (Kapetawa's father) is stated to be a Ngatipaoa, was living in a pa near Orakei. His brother's son was Kapetawa. Tarakumikumi married Kapetawa's sister, *i.e.*, his own niece. The uncle and the nephew went out one day to fish near the Bean Rocks, and the uncle took the nephew, then a boy, and put him on the rock at low water, and left him. As the tide advanced, his mother from the shore heard his screams, put off in a canoe from Kohimarama, and rescued him. Kapetawa cherished the remembrance of this affront until he grew up, when he raised a war party of Ngatipaoa, and attacked his uncle in the pa at Orakei. This pa was taken, and another at Kohimarama, and many people killed, but Tarakumikumi escaped. Kapetawa,

thinking his utu insufficient, pursued Tarakumikumi to Waiheke, where he finally wiped off his early insult by killing him and his wife and children, and, then pursuing his successes, took many pas and killed many people. He settled at Waiheke, and the title of his descendants has been recognised to a portion of land at Putiki, founded, it is suggested, on this conquest.

Now, it is abundantly clear that this alleged conquest is nothing but a raid made for revenge. If Kapetawa had extended his views, and followed up his successes at Orakei, by taking possession of the land, and with his descendants permanently settling there, they would, doubtless, have acquired a title, but nothing was further from his thoughts. Tarakumikumi had escaped him, so the chase was renewed, and when at length he came up with him and killed him he quietly settled down where he was, and (as far as the evidence goes), giving no further thought to Orakei, ended his days in peace in his new acquisitions in Waiheke.

And this inroad into the district could have made no permanent impression, for we find at a later period the country fully peopled, and Kiwi, chief of the Waiohua, the tribe alleged to have been destroyed by Kapetawa, living at Mangakeikei (One-tree Hill), and sounding a big gong to a numerous people who lived there and holding places of strength on all the volcanic hills of the country, besides pas at Kohimarama and Taurarua, at the former of which places Kapetawa is alleged to have exterminated the original inhabitants. And at a later period of our history, after Kiwi had been killed, we find a populous pa at Te Umuponga, Orakei; and we are told of the sentinels singing their songs on the ramparts of Kohimarama as Ngatiwhatua advanced to the assault.

It does not appear to me that this inroad of Kapetawa should be allowed to have any weight in determining the question of ownership of any land, except perhaps that portion of Waiheke where he settled. The history has the characteristics of the inroad of Chevy Chase, except that the result was more fortunate to the aggressor.

1720.—KIWI.

About the year 1720, a great chief of Waiohua or Ngaiwi is found living in strength at One-tree Hill, where he had a pa, the trenches of which may be seen to this day. His people held pas or positions of defence, formed by large ditches and protected by stakes, and in some places by stone walls, at Mangakiekie (One-tree Hill), Maungarei, (Mount Wellington), Mangere, Ihumatao, Onehunga, Remuera, Omahu (near Remuera), Te Umuponga, at Orakei, Kohimarama, Taurarua, (Judge's Bay), Te To, (Freeman's Bay), Rarotonga (Mount Smart), Te Tatua (Three Kings), Owairaka (Mount Albert), and other places. In fact, he appears to have held undisputed possession of the whole country from the Tamaki river to Te Whau, and stretching from the Manukau to the Waitemata. But prosperity *and pow*er appear to have made him treacherous and overbearing to *his neighbours.* For we find about the year 1740, at a feast at Wai-

tuoru, Kiwi, assisted by Te Rangikaketu, the great-grandfather of Heteraka, surprised and treacherouly murdered thirty of the tribe Te Taou; and about the same period he murdered, at Mimihanui, in Kaipara, Tahatahi, the sister of Tuperiri, a chief of Te Taou, and grandfather of Apihai, (the claimant), and other members of the *tribe.* We are also told by Hoterene Taipari that Kiwi's people murdered Kahurautao, an ancestor of Ngatimaru, "a different man," he adds, from the ancestor in "Heteraka's pedigree;" and about the same time Kiwi or his people treacherously killed Te Huru and Taura, of the Ngatiwhatua tribe, in Kaipara.

CONQUEST OF WAIOHUA BY TE TAOU.

At length, the Kaipara tribes took steps to avenge the slaughter of their friends, and about 1741 an army of Te Taou, under Wahaakiaki and other chiefs, descended from Kaipara to Manukau, crossed the Heads in the night time in canoes made of rushes, and stormed Tarataua, a pa of Te Waiohua or Ngaiwi, to the south of Awhitu, and slaughtered the people in it. The taua then returned and attacked Pukehorokatoa, a pa to the north of Awhitu, but met with a repulse, and re-crossed Manukau Heads. Kiwi assembled all his people from One-tree Hill, Mangere, Ihumatao, Moerangi, and other pas, and a great battle ensued at Poruroa (Big Muddy Creek). The Waiohua were defeated with immense slaughter, 30 being destroyed in one canoe, and Kiwi was killed. One-tree Hill and all the pas in the neighbourhood were deserted by the vanquished, and taken possession of by Te Taou. The remnants of the Waiohua assembled in their pa at Mangere and made a final stand, spreading shells on the paths approaching to the pa, so that the sound of their being crushed might give the alarm in case of a night attack. Te *Taou* advanced under Tuperiri, another of their chiefs (Apihai's paternal grandfather), spread their dogskin mats over the shells, assaulted the pa, and took it by surprise. The whole of the people inside were killed or finally dispersed, except some women and a few men, who were spared, amongst whom was Paerimu's grandfather.

CAPTURE OF KOHIMARAMA AND TAURARUA.

Two months after the pa of Mangere fell, the Ngatiwhatua, another tribe of Kaipara, to which Te Taou were related, collected their forces to avenge the murder of their friends Te Huru and Taura, and under their chiefs Takaae, Te Pahi, and Raoraowhaina, passed over the isthmus of Waikoukou to Pitoitoi (Brigham's Mill), and sailing down the Waitemata, assaulted and took in one day the pas of Kohimarama and Taurarua, held by Waiohua under their chiefs Hupipi and Humataitai, twin brothers. After destroying all the inhabitants, Ngatiwhatua returned to Kaipara, leaving the fruits of their victory to be enjoyed by their friends Te Taou.

Thus ended this episode in the history. Te Waiohua were extirpated as a tribe, and individuals only existed in a subject state, or as *wives amongst* the conquering tribe. Tuperiri built his pa

One-tree Hill, and entered into occupation of the desolated and vacant country, and held undisputed possession of all the lands twelve months before inhabited by the numerous tribe Te Waiohua, which had now become extinct.

REMARKS THEREON.

Before leaving this epoch, I desire to notice two remarkable circumstances which appear to me to have an important bearing on the case generally, and especially as indicating to some degree the real value of Heteraka's claim, and the importance to be attached to his case as put forth in his own evidence. Many witnesses speak of these histories with slight variations, which, to my mind, give a greater aspect of truth to the teller of traditions. Some of these variations were noticed by counsel, and admitted as errors or explained in a remarkable manner, as for instance the two Kiwis; but in the general tenor of the tale there is evidently a clear and very consistent train of history. Many of these witnesses must have seen and talked with the actors in these events. Apihai very probably heard from his grandfather the tale of the night attack on Mangere. It was Paerimu's grandmother who was murdered at Mimihanui, and he doubtless heard his mother often talk of the death of her mother and the subsequent capture of her husband's father at the great destruction of her tribe at Mangere. Warena Hengia has himself seen the posts of Tupiriri's pa at One-tree Hill, and Te Waka Tuae lived in the pa at Onewa as a child. Yet only one witness mentions Mount Eden all through these operations, and, when questioned directly, without one exception they say they never heard of a pa having been there in or since the days of the conquest. Yet Heteraka told us that Rangikaketu lived there with his people, and that it was the "permanent pa" of his grandfather, Te Hehewa. Now, Te Rangikaketu was a party with Kiwi to the murders. It is not credible that after the decisive battle of Paruroa, in which Te Rangikaketu was engaged, and at which Kiwi was killed, and his tribe so disheartened that they abandoned all their pas on the north of Manukau, and concentrated themselves in Mangere for a final struggle, Rangikaketu with his Waiohua, as Heteraka alleges, can have been quietly left in occupation of Mount Eden; nor would his son have been allowed to make it his "permanent pa." But while some of the witnesses tell us of the pas taken and those abandoned, not one speaks of Mount Eden at all, and there is no doubt in my mind that it had been altogether abandoned before Kiwi's time, and that it has not been occupied as a pa since. I do not say that Te Hehewa never lived at Mount Eden. I think he probably did; that is, I see no reason for supposing the contrary. He married Huiatara, a woman of Ngatikahua, a hapu of the Waiohua, and Teke, another Waiohua woman; and, his father having apparently cast in his lot with the Waiohua, Hehewa may *have* been living there before the conquest; for if Apihai's grandfather *had a hand, as an influential* chief, in effecting it, it is not at all

improbable that Heteraka's grandfather, as a young man, may have been one of the sufferers and subsequent fugitives. But to believe that Te Hehewa, after the conquest, had a "permanent pa" there, is quite impossible. The evidence is also conclusive against Heteraka's statement that he died or was buried there. The evidence is preponderating that he died a natural death, near Manukau Heads, — that he was buried at Horohoro, near Wharenga, at the Heads, — that some chiefs of Te Kawerau, on account of their relationship to him, moved his bones to Piha, near Waitakere, and placed them in the wahi-tapu of Te Kawerau, called Pukemore, near that place, where they now repose. The other remarkable incident which occurs to my mind is the presence of Rangikaketu with Kiwi's followers at this time, and his apparent connection with their fortunes, and theirs only; for it is admitted by all sides that he was a principal chief of Ngatitai and Ngatikahu, whose possessions extended from Takapuna northwards to Whangaparaoa. And Rangikaketu is engaged in these affairs, with a few followers, who are stated to be his own people—Ngatitai. Neither side has explained this satisfactorily. If these people were Ngatitai, what were they doing there? for we scarcely ever hear of Rangikaketu or Hehewa being "in their own country," as Mr. MacCormick would say, or "in their other country," as Mr. Gillies would say. Now, I think there is evidence to show that Ngatitai were a broken people before the time of Kiwi; and, if that is so, Te Rangikaketu and his few followers were then already refugees. Hapimana Taiawhio told us of the destruction of Ngatitai in old days by the Ngatipaoa, Ngatimaru, and other Thames tribes, and we have evidence that Ngatipaoa have exercised dominion over their lands; and we were told by another witness (Paora Tuhaere), "I have heard of the lament of Te Hehewa for his pa at Takapuna." Many matters difficult to explain, such as the residence of Purehurehu and of Heteraka amongst Ngatipaoa, can be easily understood on the above hypothesis; but I do not think that the evidence on this point is sufficiently clear or decided to allow the Court to make any important deductions from it. But one thing is certain, that Te Hehewa was, and Heteraka is, a chief without any followers.

From the period of this conquest for about half a century, there is no evidence of peace having been broken. Te Taou and the new mixture, under a revived name—Ngaoho (really Ngaoho No. 2)—and the returned refugees of Waiohua, under the name of Te Uringutu, lived together in different places in or near the isthmus, in undisturbed possession. They appear to have abandoned some of the pas that they captured from Te Waiohua, but maintained One-tree Hill as their principal pa, and had outlying pas at Onewa (Kauri Point), occupied by Tarahawaiki (Apihai's father), and Te Whakaakiaki, the commmander at Paruroa; Te Taou (Freeman's Bay), under Waitaheke; Mangonui (inside Kauri Point), under Reretuarau; and Tauhinu, further up the river. "These," Waka Tuaea says, "were all the pas that kept possession of this sea (Waitemata)

after the original people were destroyed." Besides these pas, they maintained others at Mangere and Ihumatao, under Te Horeta and Awarua, with whom and whose people the Waikato tribes had begun to mix by marriage, for the protection of that portion of the tribe living on the Manukau side.

1780.—GIFT OF LAND AT PANMURE, CALLED TAUOMA.

About 1780, an event fruitful in disturbances took place. Te Tahuri, the daughter of Te Horeta, who by descent was half Ngaoho and half Waikato, had a younger female relation (called by Heteraka a teina) who married Te Putu, a Ngatipaoa man. For some reason which does not appear, he wished to live away from the residences of his friends at Wharekawa, on the Firth of the Thames; and Kehu asked her relative Te Tahuri to mark off for her a piece of land on the Tamaki river. Te Tahuri defined a large track, probably then unoccupied, commencing near the place now called Panmure, and extending round the shores to Whakamuhu, and thence inland to Waiatarua (College) Lake; and Te Putu and his wife and friends appear to have taken immediate possession. This place was celebrated for its great growth of tupakihi, the plant which produced the poisonous fruit called "tutu." The sages of Waikato, when they heard of the arrangement, predicted future quarrels and misfortunes as likely to result from the intrusion of a strange people into the hitherto compact territory, peopled alone by the cognate tribes. "Soon these two old women will be drunk with the juice of the "tutu" was the prophecy—not proverb, as Mr. Gillies understood it. It must here be noticed that the Court is of opinion that this estate was marked off for Kehu and her husband in the manner described, and that it was not the ancestral territory of Ngatipaoa. Haora Tipa and the witnesses on that side speak of Kehu as a Waikato woman, and of the land as belonging to her, though they deny the gift, and speak of it as originally Ngatipaoa land. This is clearly inconsistent. It was not alleged that Ngatipaoa had any land on the other side of the Tamaki; and I am aware that the title of the land on the East shores of the Wairoa, with the exception of a small piece of 100 acres or so at Oue, was, after a strong contest, decided in this Court not to belong to them, and they do not attempt to give any explanation of how they became possessed of this isolated piece at Panmure—called Tauoma. Indeed, when they state that Kehu was a Waikato woman and that the land was hers, it appears to me that practically they abandon their position of Tauoma being ancestral Ngatipaoa land.

1790.—FIGHT BETWEEN TE TAOU AND NGATIPAOA.

The prognostication of the Waikato sages was soon fulfilled. A party of the Ngaoho were at Mahurangi fishing for sharks, and at the same time a party of Ngatipaoa were there similarly engaged. Either to balance some old "utu" account, or to commence a new one, the *Ngatipaoa party set upon* the Ngaoho and killed great numbers of

them, amongst whom was Tarahawaiki, the son of Tuperiri and father of Apihai.

1792.

A year or two afterwards, a battle took place between the two parties at Rangimatariki, near the Whau, in which Ngatipaoa were defeated with heavy loss: "You may see hangis (ovens) to this day," says Tamati Tangiteruru. Apihai says that this engagement was to avenge the deaths at Mahurangi, but this can scarcely be, for Ngatipaoa appears to have been the attacking party.

1793.

Waikato, now closely related by intermarriage with Apihai's people begin to appear upon the scene, and, shortly after the above engagement, Te Taou, thinking they had not yet balanced the item in the utu account, caused by their losses at Mahurangi, called the Waikato tribes inhabiting the south shores of Manukau to their assistance, and together they crossed over to Waiheke to renew their attack on Ngatipaoa, but failed in meeting with the enemy. Re-crossing Tamaki straits, they were pursued by Ngatipaoa, and an engagement took place at Orohe, on the west shore of Tamaki river, in which Ngatipaoa were victorious, killing Te Tahuri, the giver of the fatal present of land, and Tomoaure, her husband and the paternal uncle of Apihai. One witness said that Rangimatoru, Kiwi's son, was killed at this battle, fighting amongst his father's conquerors. "This was the last fight of old days," and the debtor and creditor account of slain appears to have been finally left unbalanced. I will here briefly state, as too clear to require any remarks, that those contests between Ngatipaoa and Te Taou and Ngaoho were fights for revenge simply and purely, and were never contemplated to affect in any way the possession or title to the estate under investigation. At the time of this last fight, part of the Ngaoho and Te Taou were living at Hikurangi, beyond the Manukau ranges. Tuperiri, with a party, was still at Onetree Hill, and Tauoma was uninhabited. There is now a blank in the evidence for many years. Clearly no great events happened, which would cause persons to remember or detail the residences and doings of the actors in this history. It is probable that both sides were for some time suspicious and in fear of each other, and kept as far apart as possible.

1815.

I can find nothing which I think the Court ought to rely upon until about the year 1815, when Ngatipaoa appear to be comfortably settled at Mokoia, a place on Tauoma, the piece of land given to Kehu; and Apihai's people appear to be living principally at Ihumatao and Mangere, cultivating also at Okahu and on the shores of Waitemata. It is also alleged by Heteraka and his friends that they cultivated there at the same time. The only witnesses who say that they themselves personally lived and planted there at this time are Heteraka, Haora Tipa, and Taitu. Heteraka's occupation ---

have no weight in this suit, for his father had married a Ngatiwhatua woman, and he would have an undoubted right to cultivate on the estates of his mother's tribe at his will so long as he remained with them—a right which he would lose as soon as he cast in his lot with a strange tribe. Taitu and Haora Tipa pointed out to the Court, when it visited the estate, portions of land, comprising together about one-fourth of the whole property, or 150 acres, as that which they with their own hands cultivated. Now there was certainly, to say the least, great exaggeration in these statements. But, supposing that they cultivated in a settled and domiciliary manner for some period, I do not understand that any ground for the right to do so is set up except the conquest by Kapetawa, which I have already stated that the Court does not think has any characteristics beyond that of a raid for revenge for "personal affront." Certainly it cannot suffice in this Court to create any "take" for his descendents to commence cultivating a century afterwards. Apihai alleges that he and his people were in permanent occupation at the same time, but he and his witnesses all deny that any Ngatipaoa were cultivating Okahu (including in that name the whole estate) along with them. I think the truth is that neither party had their real domiciles at Okahu at this period, but that Ngatipaoa (including Heteraka, for he appears to have been living with them) lived at Mokoia, and Apihai and his people at Mangere, as their head-quarters, and that both parties came over to Waitemata waters for fishing purposes, and planted food at Okahu simply for such purposes—the former in a very small way, and the latter more largely, for it must be remembered that the tribes were in a state of perfect amity at this time. The Rev. Dr. Maunsell gave important testimony as to the habits of Maoris cultivating the lands of other tribes while in a state of friendship, and Hotereni Taipari gave some remarkable instances of the same custom: Ngatipukeko, now living on the lands of Te Parawhau, at Whangarei; Ngatipukenga, on the lands of his own tribe, Ngatimaru; and his own tribe, formerly living on the territory of Ngatikarowhai. I do not remember that any claims have been established in this Court solely on the ground of modern occupation without reference to some "take" of old days; and the Ngatipaoa seem to admit this rule, for they set up Kapetawa's conquest, which, in the judgment of the Court, does not suffice.

1818.

A few years after settling at Mokoia, Ngatipaoa built a strong pa, very near to Mokoia, called Mauinaina.

1820.

About the year 1820 we find a large party of Ngatipaoa living at Mauinaina; Te Taou at Oneonenui (Kaipara), and others of them at Onehunga; and Ngaoho at Mangere and Okahu, the former being their pa or head-quarters. I think the partial cultivation by some *members* of Ngatipaoa on or adjoining the Okahu estate still con-

tinued, but I am very doubtful on this point. They owned the land up to the college lake, and a trespass over the boundaries would be regarded with no jealousy, but rather as a flattering testimony of confidence and good feeling.

1821 OR 1822.

A party of the Bay of Islanders (Ngapuhi) touched at Tamaki Heads on their way to Maketu, on a war expedition against Te Arawa; and another party, under Koperu, came down from the Bay in canoes and attacked Mauinaina, but were repulsed by Ngatipaoa, assisted by Apihai and Ngaoho, and Koperu was killed. Apihai and his party came from and returned to Mangere.

Hongi Hika, the great Ngapuhi chief, in command of a powerful party of the Northern natives, armed with guns, went up the Frith of the Thames and took by assault a large pa at Totara, near the mouth of the Thames, held by Ngatimaru and the Thames tribes. The slaughter was very great, and the strength of the tribe was much weakened. In the same year Apihai and his people united with several of the Waikato tribes and started on a war expedition through Rotorua to Hawke's Bay; thence they went on to Wellington, and returned back through Taranaki to Waikato and home. They were away nine months, and during their absence in 1823, Hongi Hika attacked Mauinaina (Panmure) Pa and captured it from Ngatipaoa. Those who escaped fled for the most part up the Waikato, while some joined their friends at Maungatautari. The loss of life appears to have been very great, and Hongi remained there many days feasting; then hauled his canoes over the portage at Onehunga, sailed across the Manukau to Waiuku, again hauled his canoes across the portage one and three-quarter miles into the Awaroa river, near its source, thence down the Awaroa, straightening the channel where the length of his large canoes required more room, and passed up into the Waikato river. He sailed quickly up the Waikato and Waipa rivers, driving all the inhabitants, men, women, and children, before him until he arrived before a great pa at Matakitaki, on a high sandcliff at the place where the Mangapouri river flows into the Waipa. The total population of the Waikato country seems to have collected here; and here, also, some of the remnants of Ngatipaoa, who fled from Mauinaina, sought a refuge. Hongi attacked the place at once, and took it. The slaughter which ensued was very great. Mr. Cowell, who at the same time was living at the Bay, and who saw Hongi start and return, says that above 2,000 people were killed, and many heads were brought back to the Bay. Some of the Ngatiwhatua joined Hongi in this expedition, but I can find no explanation of this singular circumstance. Hongi returned to the Bay after a year's absence. When Apihai and his tribe returned from their Southern invasion, they found that all these events had taken place. Mauinaina, which he left a flourishing settlement, was desolated and vacant, and the survivors of the slaughter, who fled from Mauinaina were either dispersed among their friends up the Horotiu or had been killed at Matak

It appears probable, also, that those of his own tribe whom he had left behind him at Mangere, and scattered about the country across to the Waitemata, had fled away to the broken country known as the Manukau Ranges, where they at all times of great danger appear to have found certain refuge. Apihai and his people took up their abode at Hikurangi, the wooded district to the north of Manukau heads, and Oneonenui, in Southern Kaipara. From thence they moved to Waikumete (Little Muddy Creek), a small stream flowing into the Manukau, and finally settled down along with Ruka Taurua and some Ngatitahinga (Waikato) people at Te Rehu (Low and Motion's), a small stream flowing into the Waitemata. During nearly two years Te Rehu appears to have been their principal domicile, though they occasionally visited Pahurihuri, in Kaipara, and had also some small cultivations at Okahu, and at the place where Auckland now stands.

This year (according to Heteraka) Ngatipaoa organised and sent from Waikato, under Purehurehu, Heteraka's father, a war expedition against Te Parawhau, (Ngapuhi), living at Whangarei; and another Ngatipaoa taua started under Te Rauroha, their chief, who made a successful attack against the same tribe, and killed Kaipia, and took Kahungau prisoner.

1824.

In 1824 the three tribes were living at Te Rehu (Low and Motion's), and had also a settlement at Kumeu, the head of the Waitemata river, visiting as before Okahu and Auckland. The whole of the Ngatiwhatua tribes assembled, for some object not told, at Aotea, on the banks of the Kaipara, and immediately afterwards many of Te Taou and Ngaoho settled at Okahu.

In the early part of this year a party of Waikato chiefs, headed by Te Kanawa and Te Kati, visited the Bay of Islands to make peace with Ngapuhi. After the usual speeches, peace was made, and one of the chief women of Ngapuhi, Matire Toha, was betrothed to Te Kati, who was Potatau's brother, as a pledge of peace and permanent friendship. The Waikato party, accompanied by the bride and sixty Ngapuhi chiefs under Rewa and others, started away from the Bay by the direction of Hongi to return the visit of the Waikato chiefs, and to complete the peace by formally reinstating the tribes of Waikato in their usual residences. When the party arrived at Takapuna they were met by Apihai at the head of all Te Taou Ngaoho, and Te Uringutu, who treated them courteously and supplied them with food from Okahu, where at that time they were sojourning. The Taou took the Ngapuhi party up the river to Ongarahu, where they entertained them for three days. The Ngapuhi party then went to Te Whau, dragged their canoes over the neck of land into the Manukau, and thence, pursuing the route formerly traversed by Hongi, they passed up the Waikato. At Weranga o Kapu, an island in the Waikato river below Tuakau, they saw a party of Ngatipaoa, *under Kohirangatira and* Paraoarahi, living in a pa; and, arriving at *the pas of the Waikato* on the Mangapiko river, a branch of the

Waipa, they there found another party of Ngatipaoa, part of the survivors of the original inhabitants of Mauinaina. The Waikato chiefs of the pas were Te Kanawa and Te Roherohe, and the chief of Ngatipaoa refugees Te Rauroha. The Ngapuhi chiefs remained two years at this place and then returned to their own country. At the end of the year 1824, Te Taou and Ngaoho were living at Te Rehu, at Horotiu (Queen-street), and some at Okahu. Most of these facts I have taken from the statements of Matire Toha and Ruka Turua, one of a Waikato tribe and the other of Ngapuhi, independent witnesses who have no claim to the estate under investigation and no interest in the matter.

1825.

Heteraka tells us of an expedition of Ngatipaoa who started from Waikato about 1825 and assailed the Ngapuhi at Whangaruru and defeated them; and at a later part of the year Te Uringutu, under Hakopa Paerimu, who with Ruka Turua were making a fishing visit to Motu Tapu, were attacked by Ngapuhi, under Te Rori, and many of them killed, amongst whom was Popiotahi a relation of Paerimu's. Twenty women were captured. Apihai, with the tribe Ngaoho, and Wakaariki, with Te Taou, arrived in the night time and were urged to renew the contest, but declined, and retreated with the Uringutu to Kumeu. A party of revenge was shortly afterwards despatched by Te Taou and Ngaoho, accompanied by Ruka Taurua and Te-Ao-o-te-Rangi at the head of some Ngatitahinga (Waikato); and they advanced to Whangarei, and planned and executed a very successful surprise against the Parawhau (Ngapuhi), who, being from their position accessible and handy, seem to have been selected as objects of attack whenever an utu account wanted a victim to balance it. Many men were killed and 40 women taken prisoners, with whom they returned to Kumeu.

A short time afterwards Te Taou, Ngaoho, and Uringutu, to the number of two hundred, settled permanently at Okahu, and made this estate the head-quarters of the tribes. They had been living here a year, when the battle of Ikaranganui took place. From the time of the battle of Mauinaina, Tamaki district had been entirely abandoned by Heteraka and Ngatipaoa.

1826.

In the year 1826, Hongi Hika again appears in our history. At the head of a large party of his own tribe he advanced into Kaipara, where he was joined by Te Parawhau under Tirarau. A battle ensued at Ikaranganui, in which all the Ngatiwhatua tribe, of Kaipara, were engaged, and in which they sustained a severe defeat. The Ngaoho and Apihai's people were not there, all of them still being at Okahu, but Apihai himself was approaching the field of battle to take part in the combat, when he met his friends in full retreat, and he fled away with the rest. Hongi returned with his people; and the Uriohau and Ngatiwhatua proper, and oth-

defeated tribes, retreated to Waikato Heads, where they left their women and children. Returning unexpectedly, they suddenly attacked Te Parawhau, at Otamatea, and out of a party of eighty, killed seventy and captured ten, who were subsequently liberated. The head of Tuhoihoi, the chief, was taken to Waikato, and the flesh of the rest. Thus impedimented, Ngatiwhatua fled rapidly up the Waikato, and sought refuge with Ngatipaoa in the before-mentioned pa of Rauroha's, at the Mangapiko. Ngatipaoa invited them in, and the same day Hongi, who had been in full pursuit, arrived. And now came one of those strange combinations and commingling and separating of parties which are so constantly occurring in this history, and which are so utterly unintelligible. Ngapuhi were joined by the Ngatihaua (Waikato), and the allies desired the Ngatipaoa to leave the pa in order that they might attack Ngatiwhatua. Te Rauroha and his people complied with this request, and the allies immediately stormed the pa, and killed many of the Ngatiwhatua. After this adventure, peace was made between Ngatipaoa and Ngapuhi, and many of the Thames tribes returned from their refuges, and took up their abodes at Waiheke, Taupo, and elsewhere, occupying also the other side of the Frith; but they do not appear to have been perfectly assured of their safety in these open places, for there is evidence of their constantly moving backwards and forwards during the whole of these unsettled times. Te Taou and Ngaoho were not concerned in these affairs.

Although Apihai's tribes had not joined in the battle of Ikaranganui, they seem to have known that it would have been unsafe for them to await the arrival of Hongi—whether on account of their near relationship to Ngatiwhatua, or on account of their doings with the Parawhau, we are not told. At any rate, they determined that it was not wise to stay here, so they assembled at Waikumete (Little Muddy Creek), and fled up the Waikato to Pukewhau, on the Waipa, and, after sojourning there a short time, escaped to Mahurangi, where a party of Ngapuhi lived, who were friendly to Apihai.

At this time the Upper Waikato country, Maungatautari, Cambridge, etc., was in the occupation of Ngatipaoa, Ngatimaru, and the Thames tribes. In fact, here the great body of their people seem to have been living.

The close of this year found the whole of this isthmus without an inhabitant. Ngatipaoa had been driven from Mauinaina, and were living on the banks of the Mangapiko and Horotiu. Heteraka was wandering about, sometimes in Waikato (his mother dying about this time at Rangiaohia), and sometimes in the Thames districts. Ngatiwhatua were thoroughly broken, attacked first by Ngapuhi, and then by Waikato, for which purpose their friends the Ngatipaoa politely stood on one side, and seemed likely to share the fate to which they *and their* related tribes had previously subjected the Waiohua. The *Taou and Ngaoho* were in refuge near Mahurangi, subject to constant *attacks and dangers.* Ngatiteata, Ngatitamaoho, and all the Manukau

tribes were in pas and strong places near the head waters of the Waikato river, or on the banks of the Waipa; and Te Uringutu were sojourning for some untold reason with a party of Ngatipaoa, who seem to have been living at Whakatiwai and Ponui. No tribe was in its own place. For many years there is, in truth, a blank in the *history* of Tamaki. About 1832, Mr. Cowell, sailing from Waihopu-*hopu*, at the head of the Hauraki Gulf, opposite Shortland, to Mahurangi, did not see a single inhabitant nor observe a single fire. From Whakatiwai to Mahurangi the country was quite empty. The dread of Ngapuhi was so great that the people thought of nothing but securing their personal safety, and the mountain ranges and inaccessible or little-frequented places were then more sought for than fertile lands. "All the tribes were being driven backwards and forwards," said Mr. Cowell. "Everything was in confusion, and no one settled anywhere," was Mr. Marshall's recollection of this period. "All the men were wandering about the face of the earth," was Warena Hengia's evidence. Hori Tauroa said that all people thought of was to save their lives and get guns. And Apihai asked, "How could a man settle anywhere with the fear of Ngapuhi?" Ngatipaoa seem to have gradually formed a large settlement at Waihopuhopu, but they never returned to their old place Mauinaina, because, as they alleged, the land was tapu from blood; most likely because, although they had made peace with Ngapuhi, they had a natural feeling that this isthmus—the highway of all war parties—was not a desirable place for a tribe to live in in such evil days as those. I therefore propose to discontinue the narrative style which I have adopted, and merely refer to a short chronological epitome which I have prepared of events which happened during the interval from the battle of *Ikaranganui* until people reappear in Manukau. And I broadly state *the* opinion of the Court that nothing that happened during this dreadful interval can in any way affect the ownership of this land. As the title was in 1826, so it would be when the history is resumed in 1835. I will therefore here adopt my epitome.

1827.

Apihai and his party collect from the forests at Waiaro, near Mahurangi. They are here attacked by Te Parawhau, under Tirarau; their pa is captured, and the remnant flees to the mountains. After some time they assemble at Orewa, and proceed by Takapuna to Te Whau, thence to Woods' Island (Pahi), thence to Kopapaka (Henderson's Mill). Here they settle—Apihai, Tinana, Uruamo, Watarangi, and most of the Taou and Ngaoho. Te Urungutu, under Hakopa Paerimu, are living with Ngatipaoa at Wharekawa.

Shortly after Apihai and his people settle at Kopapaka, they are fetched by Hakopa Te Paerimu, and carried in Ngatipaoa canoes to Wakatiwai. Thence they pass up the Piako River, and the Horotiu to Haowhenua, near Maungatautari. Most of them remain here until the expulsion of Ngatipaoa in 1831.

The other Ngatiwhatua tribes, with some of Apihai's people,

occupy a pa on the banks of the Waipa River, near Kaniwhaniwha, called Te Horo. Along with them are Ngatiteata, Ngatitamaoho, Te Akitai, and most of the Manukau tribes.

Ngapuhi, under Pomare, invade Waikato, and are defeated at Te Rori, on the Waipa, by Ngatiteata and other Waikato tribes. The Ngapuhi party is nearly all destroyed.

1828.

Ngatitipa (Waikato) defeat Ngapuhi, under Rangitukehu, at Paneherinui, near Tamaki Heads.

1829.

Ngatiwhatua, Ngatitipa, and other tribes defeat Ngapuhi at Tawatahiti, in the North. Hongi is killed at Wangaroa.

1830.

A portion of Ngatipaoa is seen by Mr. Marshall living at Waikato Heads. The great bulk of the Ngatipaoa and Thames tribes at this time occupy the country extending from the Frith of the Thames to Maungatautari, including considerable part of the Waipa Delta.

1831.

The Ngatipaoa and Thames tribes are attacked by all Waikato under William Neero, Te Waharoa, and other chiefs, and defeated with great loss at Taumatawiwi near Haowhenua or Pukekura, near Maungatautari. The pa is evacuated, and Ngatipaoa are expelled from the Upper Waikato. They go to Waihopuhopu, Wakatiwai, and the Frith of the Thames. They are subsequently driven entirely out of this part of the country (Upper Waikato) by a treacherous attack made on them at Matamata by Te Waharoa's people.

When passing down the Horotiu after the evacuation of Pukekura, Apihai and his people accompanied Ngatipaoa—leaving them at Ngaruawahia and passing up the Waipa, join their friends at Te Horo pa. Here they remained until their return to Manukau in 1834.

1832.

Mr. Cowell makes a voyage from Waihopuhopu (Frith of Thames) to Mahurangi, sailing past Tamaki, Motutapu, etc., and does not see a fire or a native during the whole interval. This part of the country quite empty.

Great expedition of Ngapuhi under Pukerangi, and of Parawhau under Tirarau against Waikato. The Waikato tribes are driven before them up the river, but Ngapuhi retreat without effecting anything. Te Akitai, Te Taou, Ngatiteata, and other Manukau tribes follow them North, defeat them and kill Pukerangi, the leader.

Te Taou, &c., still living at Te Horo with the greater part of Ngatiwhatua.

It thus appears that during this interval the fortune of war had *been gradually but constantly* turning against Ngapuhi. Waikato,

having procured arms through Mr. Cowell and other traders at Kawhia and Waikato Heads, had been rapidly rising into prominence; had successfully repelled all the late Ngapuhi invasions; and had even inflicted some defeats upon that tribe in the North; had carried their arms down south to Taranaki; and had, by 1834, assumed a *military* position which entitled them to be considered the dominant *people* in this part of New Zealand. They had, moreover, completely driven Ngatipaoa with much loss out of their possessions in Upper Waikato, and had made peace with Ngapuhi. When, therefore, in 1835, Te Wherowhero, the most powerful chief of the district, proposed to conduct the Manukau tribes to their old places, and locate himself amongst them, there was little chance of their being molested by any of the armies which had for 12 years made this isthmus a place where it was impossible for anyone to live. Moreover, Christianity had begun to make some progress, and, wearied and worn out with war, the people appear to have hastily and gladly embraced the new religion, which, while it offered them a prospect of a happy life after death, secured to them, at any rate, a tolerable certainty of keeping their bodies in peace in this world until the time came for them to die naturally, and without being converted into the "heads," which one of the witnesses so frequently alluded to, and by the number of which he appears to have recollected events.

1835.

Accordingly we find in 1835 Te Wherowhero, with his own personal tribes Ngatimahuta, Ngatiapakura, &c., brought down Ngatiteata, Ngatitamaoho, Te Akitai, and the other Manukau tribes, along with Te Taou, Ngaoho, and Ngatiwhatua. A small party came first to prepare for the greater migration, stopping on their way at *Wai*hekura and Kaitangata places on the Ngatitipa's land in *Waikato*, where they put in crops, left them to grow, and came on to *Manukau*. Finally Te Wherowhero settled with his own people at Awhitu, as a guarantee of the protection of the Waikato to the rest. Ngatiteata took possession of their own lands at Awhitu. Ngatitamaoho returned to their places at Pehiakura, Te Akitai to Pukaki, and the other Manakau tribes to their former residences. Apihai and his people took possession of Puponga, where they built a pa called Karangahape.

In this year the missionaries, Dr. Maunsell and others, took up a station at Puriri, near the mouth of the Thames. Possibly at their instigation, otherwise spontaneously, a meeting of the Thames and Waikato tribes was convened for the purpose of formally declaring peace. This peacemaking was necessary, not only on account of the great war between the tribes which had terminated in the expulsion of Ngatipaoa from the Waikato valley, but also on account of the attack made by Te Aua, Ngatitamaoho, and other Waikato-Manukau tribes, assisted by Apihai and some Ngaoho, upon Ngatipaoa at Whakatiwai. The object of this attack was to balance an "utu" account, *and in no way* concerned the land under investigation or

any other land. The Ngatipaoa side say that this account had been previously squared, and that the killings which happened at this attack were murders. The other side deny this, and say. that the balance was against them previously, but the deaths of the three men who fell wound up the account, and the whole proceeding was "tika." Whether it was so or not is of no consequence as regards this suit. Nor can this peacemaking or any other peacemaking at which no reference is made to land, and where the previous quarrels had been purely personal, and no land had been seized or occupied which had been previously in the possession of the other side, be regarded as a matter which this Court is called upon to consider in deciding ownerships of land. If in consequence of wars a tribe abandons a place in their possession because it is too close to the hostile tribe, or too open to attack by them, and the hostile tribe takes no possession, and the land simply lies vacant until better times come and the previous owners return, nothing concerning the title can be founded on such evacuation; and the peace when it is made merely affords to the temporary emigrants the assurance of their personal safety on their return to occupy their former residences. No doubt that is the native custom. And not one of the witnesses on any side asserts that at any of the peacemakings any conditions or stipulations were made or proposed with respect to any land except Mr. Fairburn's purchase. Kahukoti's conversations will be noticed hereafter.

In December, 1835, Kahukoti, chief of Ngatipaoa, and Taraia, chief of Ngatitamatera, arrived at Tamaki with Dr. Maunsell; and Te Wherowhero and Kaihau, on behalf of Waikato, went over to Puneke, on the Tamaki river, to meet them. Here peace was finally concluded. Uruamo and Watarangi, of Te Taou, accompanied Te Wherowhero; but Apihai and Ngaoho, and the bulk of the people, remained on the Manukau side, and did not join in the peace-making.

About the same time Apihai and his friends sold to Mr. Mitchell, on behalf of a Scotch company, a vast tract of country, extending from Manukau Heads to Tamaki, and thence along the Waitemata to Brigham's mill on the West Coast. Mr. White said this transaction occurred in 1833, but I think he must be wrong.

The succeeding year, 1836, Apihai and his people were living at Karangahape, but they commenced to cultivate at Mangere. Later on in the year, they built a pa at Mangere and another at Ihumatao. Another meeting, said by some to be a missionary meeting, took place at Otahuhu, at which the peace between Ngatipaoa and Waikato was confirmed in an informal manner. Te Taou came to the shores of the Waitemata, and began to cultivate the land about Horotiu (Queen-street). Mauinaina was still unoccupied and desolate. Captain Wing made a chart of Manukau harbour, which he produced in Court. It showed Mr. Mitchell's house as then standing at Karangahape. Potatau's people commenced planting at Onehunga, and Te Tinana, of Te Taou, cleared for cultivation at Kangitoto, near Orakei.

In April of this year, Uruamo and Watarangi, with 60 of their *people (Te Taou), went* to Orere, near Taupo, on a peacemaking

visit to Kahukoti, chief of Ngatipaoa, on account of the Whakatiwai killings. They made presents as payment for the dead, performed the customary ceremonies, and finally made peace. At the great meeting at Tamaki, when peace was made between Waikato and Ngatipaoa, it was stated that Uruamo requested Kahukoti, to allow Te Taou to occupy Okahu, to which he replied, "Presently;" and the conversation was renewed at this Orere visit. This is what passed according to the evidence of Timothy Tapaura, a Whakatohea slave who was present. Uruamo said to Kahukoti, "I want you to agree that Okahu shall be lived upon by us;" to which Kahukoti replied, "Yes, light a fire there for both of us." This account is directly denied by all the claimants' witnesses. None of them, however, were present except Warena Hengia. He says there was a conversation, and his account of it is this: Uruamo said to Kahukoti. "My friend, my fire will now burn at my place." Kahukoti replied, "My father, to whom does your kainga belong?" Now, as the Ngatipaoa allege that this permission given by Kahukoti was the only ground of the undisturbed possession held by Apihai of this estate for more than 30 years, it is evidently necessary to inquire into this conversation. The circumstances were these:—After the usual salutations and ceremonies had been performed, the visitors were shown to a large house in which they took up their quarters. In the evening Kahukoti came to visit his guest, according to the usual custom, and then this conversation happened. Warena Hengia is the only witness on Te Taou side who knows anything about it, and there are two on the other side who state that they heard of it, and that it was as detailed by Timoti Tapaura. Now, it must be remembered that the last time Okahu was permanently occupied was the year 1826, at the time of the battle of Ikaranganui, at which time Mauinaina had been three or four years captured, and its occupiers dispersed amongst the Waikatos. What had happened in the interval between the two peoples? *Nothing*, except the attack at Whakatiwai, which was the occasion of the present meeting. It must be remembered that at the fall of Mauinaina the tribes were in perfect amity, and the year previous to that attack were fighting together against Koperu's army. What possible reason was there then for the alleged permission to be asked? If we go back to the time anterior to Koperu, and take the idea most favourable to Ngatipaoa, viz., that both people were then cultivating there, we can find no reason for asking permission to return to that status, especially as Ngatipaoa, had totally abandoned that part of the country. It might possibly be suggested that the "tapu" for Mauinaina extended over Okahu, and that Te Taou wanted the assent of Ngatipaoa to breaking the "tapu." But this will not help us, for the "tapu," if it ever extended over Okahu, had been broken and disregarded long before, for, as we have seen, the whole tribes Te Taou, Ngaoho, and Uringutu were living and cooking there, at and before the battle of Ikaranganui. But I do not believe that Okahu ever was or could be included in the Mauinaina "tapu," for no blood was shed there. *Moreover, the* whole tale as recounted by Ngatipaoa

is not only quite inconsistent with Maori custom, but also with Ngatipaoa's present case. Heteraka Takapuna is alleged to be the putaki of the Ngatipaoa title, and yet he does not appear to have been consulted—as consulted he would have been if his title had been recognised then as now, and if such an event had really happened. Moreover, there is no pretence made of any previous meetings or consultations of the Ngatipaoa chiefs to discuss such an important question. The well-known Maori habit seems to have been entirely forgotten, and a chief is stated to have answered a question of which it is alleged he had had previous notice at Otahuhu, and the consideration of which he had himself adjourned, without a single consultation with the tribe in the interval, and the first knowledge the tribe had of this chief's determination is a proclamation made in the morning outside his house. Besides, if Uruamo had wanted to make such an important demand, would he have trusted to the accident of Kahukoti's coming to his house? Would he not rather have sought an interview with Kahukoti wherever he could be found? And when the first request was made at Otahuhu, would not Ngatipaoa, if their present case was then believed in by themselves, have consulted with Heteraka in the interval.

The Court cannot accept either the account given by the Ngatipaoa witnesses of this conversation, or the interpretation put upon it by them. That some such conversation did pass I quite believe. I think that Te Taou and Ngaoho were aware that the Thames tribes still nourished feelings of revenge on account of the killing of their friends Rewa, Hauruia, and Kapatahi, at Wakatiwai; and that they were perfectly correct in this belief is shown by the fact that even six years later Ngatiwhanaunga gave Haora Tipa a paddle and two tomahawks, called after their dead men, as a sign that he should go and avenge their deaths. And it is quite natural that so long as this feeling was known to exist Te Taou and Ngaoho should be unwilling to locate themselves permanently, with their women and children, on the shores of the Waitemata, where they would be peculiarly open to attacks and surprises from Ngatipaoa, who, although they had suffered greatly, were still a powerful tribe. One can well understand, therefore, how, after peace had been formally concluded, and the ancient feeling of amity restored, the Taou chief would exclaim to his host, when he came to pay him a friendly visit in the evening, "I can now return without anxiety to my old home." To which the other would reply, "Certainly, why should you not go to your own place?" And even if Kahukoti had replied, "Yes, return there and light a fire for both of us," I can see nothing in the words beyond the polite expression which is usually given by the Maoris to their language when talking with persons of rank with whom they are in friendship. When travelling with a Maori in his canoe, he never speaks of "my canoe;" the phrase is always "to taua waka," "the canoe of us two," and if his guest smokes he will give or ask for "to taua paipa," whether it *belongs to himself* or to you; and if you live on his land, he will *speak to you of* "to taua kainga," without the slightest idea of con-

ferring any title upon you. And this expression—"tahuna he ahi ma taua,"—would (even if used) mean no more than a civil way of expressing that he should be glad to see Te Taou living at Ikahu, for he would be then often able to come and see them, and accept their hospitality.

The Court, then, being of opinion that no importance whatever is to be attached to this conversation of Kahukoti, and that it cannot be construed into acknowledging a title on one part, or giving a temporary leave of residence on the other, I shall make no further reference to it. At the end of this year Te Taou and Ngaoho were cultivating at Okahu.

1837.

In 1837 a pa was built at Okahu, under Watarangi and Uruamo, of Te Taou. It is stated that this pa was built against Ngapuhi (Te Parawhau), which is probable, as Apihai's people seemed to have been engaged in a long series of hostilities with them, and they were the only enemy with whom peace had not been made; and it will be remembered how Eruera Patuone, a Ngapuhi, described his refusing to land to cook food at Mechanics' Bay, when passing along these shores in a boat with Governor Hobson, preferring rather to cross over to Takapuna, from fear of Apihai, whom "he had not yet seen," as he says.

1838.

In 1838 the principal place of Apihai's people still appears to have been Mangere, but they were permanently domiciled also at Onehunga, Auckland, and Okahu. In this year Potatau took up his permanent residence at Onehunga.

1839.

In 1839 the Okahu tribes cultivated Official Bay, (Waiariki), and planted peach trees where the Provincial Council Chambers now stand. Ngatipaoa appear again in this district, but for what purpose is not shown. Te Hemara saw two hundred of them at Maraetai, when he came up with Captain Clendon in the 'Columbine.' He also saw Apihai, Te Tinana, Te Reweti, Paerimu, Uruamo, and Watarangi, and all the chiefs of Te Taou, Ngaoho, and Uringutu completely settled there. "The food of that place," he says, "had been cultivated long before; the fences were made and the houses built." He then describes going in a boat with Taipau, a relation of Heteraka's, to mark out the boundaries of land proposed to be purchased by Captain Clendon from Heteraka's tribes, Ngatikahu and Ngatipoataniwha. The boundary commenced at Takapuna and went on by the Wade to Whangaparoa.

1840.

On the 29th of January, 1840, Captain Hobson landed at the Bay of Islands. In February following, the Treaty of Waitangi was made, and on the 21st of May the sovereignty of her Majesty was proclaimed over the British Island of New Zealand.

The remaining part of the history of our case is of little importance, and I will therefore again read from my epitome.

Sept. 13.—First vessel, "Planter," with Mr. Terry and Mr. Roberton (witness) anchors at Auckland.

„ 16.—Captain Stewart's vessel, "Anna Watson," arrives with Mr. Shearer (witness).

„ 19.—British flag hoisted at Fort Britomart by Captain Symonds, assisted by Te Reweti and others.

Oct. 1.—Captain J. J. Symonds arrives from Bay of Islands in the "Ranger" cutter.

Nov. 27.—Ship "Diana" arrives with Mr. G. Graham (witness) and troops.

1841.

January.—Governor Hobson takes up his abode in Auckland. Final settlement of the gift of a piece of land called Pukapuka to Te Kati and Te Wherowhero. Te Kati and his Ngapuhi wife, Matire Toha, take up their abode there. Kahukoti and the Thames tribes visit the Governor, calling on their way to visit Apihai and his people at Okahu. Apihai at Auckland. Scotch settlers arrive in Manukau.

1842.

Haora Tipa and Ngatipaoa visit Okahu to make peace. They present Apihai with a paddle and two tomahawks, called Haramia, Kapotahi, and Rewa, after the persons who had been killed at Wakatiwai; they were presented to Haora Tipa by Ngatiwhanaunga as an intimation that he was to go to Okahu and seek "payment" for those deaths, but he did not think such a course "tika," and gave them up to Apihai instead, and made peace finally. Ngatihura, hapu of Ngatipaoa, go to Okahu and live there.

March.—Maketu executed at Auckland. Mr. Clarke, Native Protector, Patene Puhata and William Hoete, and eight others of Ngatipaoa, go to Kohimarama and attempt to run a line, including some part of the estate now under investigation, but being opposed by Apihai's people, desist and go away.

September.—Governor Hobson dies. Mr. Shortland administers the Government. Te Reweti, of Te Taou, &c., dies the same day. Ngatiteata and Ngatitamaoho come to see Te Reweti.

1843.

Mr. Shortland Acting Governor. Some Ngatiteata commence cultivating at Okahu, remaining until the time of the Whanganui war. Second pa built at Okahu by Apihai (during Governor Fitzroy's time, some say).

December.—Fitzroy Governor. Gift of Remuera to Wetere Te *Kauae, of the tribe* Te Maungaunga of Ngatitamaoho. Ngatipare, a *hapu of Ngatipaoa,* come to Okahu and settle there.

1844.

The 10s. an acre proclamation. Paora Tuhaere and others, at the invitation of Pohi and Te Meihana, visit Whangarei to make peace with Te Parawhau.

May 11.—Great feast at Remuera. Battle of Taurangaruru between Ngatiteata and Ngatitamaoho and their allies. Battle of *Ihutaroa* between Ngatiteata, Ngatipou, and their allies, and Ngati-*tipa* and their allies. All Ngatiteata and Ngatitamaoho come to Orakei and Remuera to live. They remain about two years.

October.—The penny an acre proclamation. Wetere Te Kauae sells part of Remuera, and many sales of land in this neighbourhood are made by Apihai's people.

1845.

November.—Governor Grey.

NGATITEATA AND NGATITAMAOHO.

The evidence differs as to whether Ngatiteata or Ngatitamaoho were living on this land before the time of Governor Hobson. I think it is most likely that they were living here, that is, that numbers of the tribe came and resided here, fishing and assisting at the cultivations, and returning to their own "kaingas" after periods of varying length. And I think that this practice had been continued nearly up to the time when the greater part of these tribes went into rebellion. We find that during the interval between 1840 and 1850 they came several times in parties, and on the occasion of the battles of Taurangaruru and Ihumatao the whole tribes settled at Okahu for a short time. The Court places no value on these acts of occupation. It is an ordinary custom for persons who have, or pretend to have, no claim whatever to the land itself, to come and reside upon estates of other tribes, when on terms of amity with the owners, especially when they are connected by intermarriages of the present day or by ancestry. The modern intermarriages between Apihai's people and members of the Ngatiteata tribe are proved to have been numerous, and the ancestral relationship is admitted, and is very clearly set forth in the pedigrees. This principle has been recognised by the Court on many occasions in all parts of New Zealand, and we do not intend to set up a new rule. An understanding was clearly arrived at by previous generations that each of the tribes around Manukau, which were formed from the intermixture of intruding tribes with the original occupiers of the soil, should possess and occupy certain fixed, and more or less well-defined, portions of the country; and it would entirely frustrate the object for which this Court was established, if we were to ignore these territorial arrangements, and throw the ownership of land into a state of confusion greater than that in which we found it. Occupation in modern times of land to which the title of others is admitted by such occupiers, can confer no title on them, unless the occupation is founded on some previous "take," of which

the occupation can be regarded as a consequence, and partly as a proof. And this original "take," must be one which the Court can recognise, and which would be consistent with ordinary rules governing and defining Maori custom. Mr. Hesketh sets up as such "take," or ground of title, the ancestral relationship of Hori Tauroa and his other clients of their two tribes, to Apihai and other members of Te Taou, Ngaoho, and Te Uringutu. Te Atairehia was the granddaughter of Hua, the great ancestor of Te Waiohua. She married the great Waikato chief Tapaue, the ancester of Te Wherowhero; and from the different offspring of this union there have resulted in the present day—Apihai, after a descent of four generations; Hori Tauroa, five generations; Aihepene Kaihau, five generations; and Matene Raketonga, six generations. Now, all these persons, in their several generations, except Apihai's ancestors, lived with and formed members of other tribes, into which they intermarried, and to some of which they have given their names (ex. gr. Ngatiteata), and their descendants now have their lands in the estates of those tribes. If their present representatives are allowed again to return and claim a share in the lands which their ancestors left, there will be no such thing as even a tribal right in any part of New Zealand. The whole of the tribes are related by blood in a more or less remote degree; and, if any such principle as that advocated by Mr. Hesketh were sanctioned, New Zealand would become one vast inheritance, of which all the Maories in the island would be the joint owners. And this great principle of ancient and gradual separation of tribes and tribal estates was very strikingly recognised by many of the witnesses. Hapimana Taiawhio is a much more direct and true representative of the ancient owners of the soil than any of Mr. Hesketh's clients except Maki, and he said he had no claim, although he has lived on this place, and followed Apihai's fortunes during nearly the whole of a long life. Another old chief, Te Keene Tangaroa, is similarly very pure blood of the old owners, and has lived here permanently all his life, but asserts no claim, and says that Ihaka Takaanini would have had none had he been alive; yet his mother was the great-granddaughter of Papaka, who is the ancestor on whom Hori Tauroa founds his case. Watarawhi Tawhia was another witness with similar claims and ancestral connections, but he asserted no claim.

In fine, I say that the Court cannot recognise such claims as these, without disregarding all its precedents, and ignoring the objects for which the Legislature constituted it, and overriding its previous history and decisions. It is scarcely necessary, therefore, to notice that, during these descents, the conquering Taou came in and took this part of the country by force of arms; and that, if those ancestors who are now set up, had remained on the land which is now claimed through them, they would either have been taken prisoners or killed, unless they had been allowed to intermarry with the conquerors, or become members of their tribes, as Te Tahuri did, and Mokorua did. In any of those cases the present claimants would never have existed.

The only point in the case of Ngatiteata and Ngatitamaoho which is of any value is that Paul Tuhaere, the nephew of Apihai, seems to have disregarded this rule on the occasion of the confiscation of the Ngatitamaoho's land at Pehiakura by the Crown. He applied to the Government for compensation on account of his ancestral interest in *that* land, and received from the Crown Agent (not through the Court) a sum of £150. If the Court were certain that it had all the facts of that affair before it, it would make an order for the return of that money, for we think it was wrongly obtained. "Qui sentit commodum sentire debet et onus." But we cannot consent that a successful act of imposition, as we think it to be, judging from what is before us, should influence this Court to adopt the principle involved in it, and abandon its own rules of action, with the idea of dispensing a perfect justice even beyond the limits of this suit.

The presents made on the sales of land about here do not seem to the Court to have carried any admission of ownership of the land sold. It is customary for Maori chiefs when they come into the possession of property immediately to distribute it among their friends, especially amongst those from whom they have received or expect to receive benefits, or to whom they are ancestrally related. And there is no doubt that Ngatiteata, with the other Waikato tribes who returned with Potatau, had rendered considerable services to Apihai and his people. These services were requited by the gift of a piece of land near Onehunga to Potatau, of Pukapuka to Te Kati his brother, and of Remuera to Wetere Te Kauae. The above remarks apply equally to Paora Te Iwi.

The Court is, therefore, of opinion that Hori Tauroa and Paora Te Iwi, and their co-claimants, have no interest, according to Maori custom, in the estate under investigation.

MAKI AND TE WHEORO.

The cases of Wiremu Te Wheoro and Hawira Maki are stronger than those of Ngatiteata and Ngatitamaoho. Maki, the father of claimant, seems to have lived the greater part of his life with Apihai, and only left Okahu a short time before his death. There he seems to have made his home. He was the second cousin of Te Wheoro, and grandson of Waikahina, the sister of the great Kiwi. This woman seems to have escaped the massacre of her tribe, and to have fled South to the protection of a tribe called Ngatipou, living about Pokeno, whose chief took her to wife, and these claimants are the results of the union. Wiremu Te Wheoro is a member of the tribe Ngatinaho, a hapu of Te Wherowhero's tribe, Ngatimahuta; and having cast in his lot with them, he must be regarded as a member of that tribe, and his ancestral claim will not avail. Had his father returned, and been admitted amongst the conquerors and intermarried with them, he would, as far as the Court can see, have had as good a right to be considered and treated as a member of Te Uringutu or the "collection of remnants" as Eruera Paerimu, whose right is admitted. But his forefathers preferred the

greater dignity of their Waikato connection, and he must now be excluded.

The case of Maki is more doubtful. He does appear to have lived with Apihai for a great number of years, and his claim apparently is in no way inferior to Paerimu's, except that his fathers did not intermarry with Apihai's tribe as Hakopa Paerimu did. Paerimu's wife who gave birth to Eruera Paerimu, the claimant, was Titoki, of Te Uri-o-te-ao-tawhi-rangi, the hapu of Ngaoho to which Tokarorae, whose name was often mentioned, belonged. But this distinction in their status is very important. Moreover, Hawira Maki, the present claimant, does not appear to have himself coalesced with Ngaoho at all. He has entirely cast in his lot with Ngatipou, his own tribe at Maketu near Pokeno. It is a very singular fact, to which the attention of the Court was called by Mr. MacCormick, that, though he was in the Court for many days, he never appeared as a witness in support of his claim.

Te Wheoro seemed to found some of his right to this land on the assistance and support afforded by Waikato to Apihai when they were reinstated by Te Wherowhero after the days of Ngapuhi; but whatever claim the Waikatos may have on this ground, and even if their claims were not compensated by the gift of land of which we have had evidence, it is quite clear that Te Wheoro is not the person entitled by position or connection with the tribes who gave assistance, to urge them.

The Court is therefore of opinion that Wiremu Te Wheoro and Hawira Maki have no interest, according to Maori custom, in the Orakei estate.

HETERAKA TAKAPUNA AND NGATIPAOA.

The name Ngatipaoa has been and will be used as meaning all the Thames tribes, unless some other tribe is indicated. And here I must state the opinion of the Court that, after the most careful weighing of the evidence, and consideration of the arguments used by their counsel, we are quite unable to discover any connection, either in their grounds or their incidents, between the claim of Heteraka, and that of Ngatipaoa. Kapetawa's conquest has already been discarded; but, even if it had not, Heteraka does not profess that Kapetawa was an ancestor of his. Kapetawa was six generations below the time when the Thames tribes branched off from Tainui, the ancestor of Ngatitai, and the direct ancestor of Heteraka; and four generations below Haorateranghi, the great nephew of Tainui, through whom Heteraka claims another line of ancestry directly connecting him with Ngatipaoa. He could therefore have got no status from Kapetawa's conquest, even if it had been a conquest. And this was the only conquest on which he relied. Hoterene Taipari mentions a conquest of Te Waiohua by Ngatimaru on *account of* Kahurautao, who had been murdered by them; but *he adds, "This is a* different man from Heteraka's ancestor." That *they were occupying* the land together before Hongi's time in no

way connects their claims, unless it can be shown that the grounds or "take" or occupation were the same, or had an intimate connection. Heteraka asserts that he is the representative of Te Waiohua, the ancient possessors of this country; but he also asserts that he is the sole representative. It is true that this statement was often varied; for instance, in one place he says, "There are plenty of Waiohua left—Ngatipaoa, Ngatimaru, Ngatitamatera, Ngatiwhanaunga. There are Waiohua amongst Ngapuhi. These Waiohua own this land. There are 100 there. They have a new name now. Ngatiwai of Whangaruru are the people." And using the term in a similar sense, he says in another place, "At this time Waiohua, under Kapetawa, were living at Orakei, under Hehewa at Taurarua, and at Okahu under Parakotia," forgetting that according to his own showing Hehewa lived three generations ago, Kapetawa seven. In another place he says, "There are no Waiohua left besides me that are known by that name." Now it is impossible soberly to urge that Ngatipaoa are interested in the estate as representatives of the old Waiohua, when we have living amongst us and appearing in this Court the lineal descendants of Kiwi. And if Kiwi was not a Waiohua (although the grandson of the man who gave rise to the name), and if all his tribe who were conquered by Te Taou were not Waiohuas, I cannot understand who the true Waiohuas were at Kiwi's epoch. Heteraka says they were living at Mount Eden and at Taurarua; but the circumstance continually recurs to my mind that when asked who was the chief, or who built the pa, or who was in it, the answer is always the same, "Te Rangikaketu or Te Hehewa." I cannot discover that Heteraka, from the time of Rangikaketu and Kiwi to Hongi's time, has ever mentioned the name of a single Waiohua as keeping possession of this great tract of country, or doing anything, except these two men. Waiohua, according to him, kept their ground at Mount Eden and Taurarua when the whole country was being overrun by a powerful tribe, who came to avenge the murders of their friends, at which Rangikaketu assisted; and yet, although questioned on the subject, he is silent as to any other persons composing the tribe except these two men. I merely refer to this subject now to show that the view previously expressed by the Court must be followed as the correct one, and that Kiwi and his people were the true Waiohua, although equally entitled to be called Ngaiwi. Ngatipaoa do not claim to be descended from them, and there are no other Waiohua to be descended from that I can discover. Hoterene Taipari gave a very curious version of this part of our subject, varying from that given by anyone else, and clearly inconsistent and absurd; "The ancient inhabitants of the country from Tamaki to the Whau were Te Waiohua. The Ngaiwi were from Te Waiohua. The lands of Ngaiwi were I don't know where. The people from Tamaki to Te Whau were killed by the Thames tribes. The pas of Ngaiwi were on that side of Tamaki towards Waikato. The pas of Waiohua were at Tamaki on the Hauraki side."

It appears to the Court to be a position which cannot be controverted, that the several things brought forward to support the joint title of Heteraka and Ngatipaoa must have some connection with each other, and some sequence or concatenary dependence, but we have been unable to discover any relation of the sort. I can well understand that if, in times before the English sovereignty was proclaimed here and English law was supposed to exist, Heteraka had asserted a claim to this estate, and had succeeded in getting these powerful tribes to support him in maintaining it, their union with him would have been of the greatest value, for force would have decided the contention. But such considerations will avail nothing now, and this Court has already decided, in the great Hawke's Bay case, that it would recognise no titles to land acquired by intertribal violence since 1840.

NGATIPAOA.

Taking first, then, the case of Ngatipaoa, this claim is grounded on—

I. Descent.

II. Conquest.

III. Possession and occupation.

I. DESCENT.

Most of the witnesses said they were ignorant of the ancestry through which they claimed this property; and I do not remember that any one, except Heteraka, attempted to set forth any pedigree. The answer, usually, was, "I claim through the ancestors mentioned by Heteraka." Now, this pedigree, mostly prepared by Mr. Mackay, and proved by Heteraka, contains the names of the principal chiefs of the Thames tribes now alive; and also shows the connection with Ngatikahu and Ngatipoataniwha, and with Ngatitai. The direct line is the genealogy of Ngatitai; and it is taken up even above Tainui, from whom the name, according to Heteraka, is derived. Now, with the exception of Heteraka's father, grandfather, and great-grandfather, with whom Ngatipaoa pretend to have no lateral or descending connection; and except Tarakumikumi, who, with his wife and all his children, was killed, and Kapetawa, who returned seven generations ago to settle in Waiheke, there is not a name in this list of chiefs of any person who is alleged to have lived on this property, excluding of course the present generation. It was attempted to show that Huaokaiwaka was the same person as Hua, the grandfather of Kiwi, but the attempt did not succeed. It will be remembered that, when Heteraka was asked to give his Waiohua pedigree, he commenced with Tangamakaia. This man was stated by witnesses on the other side to be a Ngaiwi, and the father-in-law of Hua, but Heteraka was unable to continue, and said he wanted to begin again. The genealogy which he then set forth is appended to this judgment, and is the one to which I have lately been referring. And we think it has nothing whatever to do with this land, and that the ancestors *mentioned in it never* had, or pretended to have, any claim to it;

and, with the exception of Tarakumikumi and Kapetawa, none of them have been shown ever to have been on it. Nor (except as above) does it show any lateral connection with any person or tribe that ever possessed or lived on the land, or any relationship with any member of the Ngaiwi or Waiohua tribes. In fact, it is the genealogy of distinct tribes, who lived in different places, and possessed different lands. Haora Tipa and the witnesses relied on this ancestry for their claim by descent.

The Court therefore thinks that this ground of their claim fails.

II. CONQUEST.

The affair of Kapetawa has been disposed of, and I cannot find evidence of any other conquest. I thought at one period of the case that I could trace something in the doings of Ngatiwhanaunga which indicated a right, acquired by force of arms, superior to that of the other Thames tribes, but the idea was not borne out. Subsequently it was stated by witnesses, and finally by their counsel, that their claims were all equal.

III. OCCUPATION.

No modern occupation can avail anything in establishing a title that has not for its foundation or authority either conquest or descent from previous owners, except of course in the case of gifts or voluntary concessions by the existing owners. Such occupation is called by the natives "he noho noa iho"—equivalent to our word "squatting." As above stated, the Court is of opinion that, whilst Ngatipaoa were living at Mauinaina, and were at amity with Apihai and his tribe, individuals of Ngatipaoa used to come over to these waters, and make small cultivations, for fishing purposes, at Okahu. The other side deny this: "horerawa," Apihai says. But whether they did or not is of little consequence—the possible grounds for a right so to cultivate not having been established; for, as previously observed, the cultivation of land by this generation must be taken merely as an evidence of a right obtained by the cultivating or conquests of antecedent generations.

The residence of Ngatihura and Ngatipare hapus of Ngatipaoa scarcely needs remark. There was, in our judgment, not the slightest evidence or appearance of any intention or thought of asserting a right when these people went to Okahu, or that their going was founded on a right. If any such notion had been in the minds of Ngatipaoa it is not escaped prisoners of war like Mohi Te Puatai, or returned Ngapuhi slaves such as Natanahira Te Urupa, or second or third-rate men like Hemi Kaihi, who would have been sent, but some powerful and influential chief like Patene Puhata, who, as we know, conducted Mr. Clarke's attempted survey. These acts of cultivation and residence were of a trivial and transitory character, much less worthy of attention than those of Maki, whose case the Court has already dismissed, although backed up by well-known and admitted ancestral relationship. Like him, when they were "sick unto death," they generally moved, after the Maori custom, to die on their own

land at Waiheke or elsewhere; or, if they died on the place, they were not buried there. In fine, their residence had all the manifestations of a sojourn, and of nothing else. Moreover, sundry other persons have lived there both before and since the time of Hongi—some of them nearly all their lives, such as Te Keene Tangaroa, Hapimana Taiawhio, Te Hamara Tauhia, Pairama Ngutahi, and Watarauhi Tauhai, who were intimately related to Apihai's people, and yet recognise Maori custom, and set up no claim. Other persons, too, of strange tribes, such as Raniera Taupape, of the Rarawa, in the North; Ruka Taurua, of Ngatitipa, in Waikato; members of the Ngaiterangi, of the Waikato tribes, of Ngatiporou, and even people of the South Sea Islands, and a considerable number of Te Arawa, who are there domiciled at this present time, have been residing there, but make no pretence of founding a claim to the land upon such occupation. The truth is that, from its proximity to Auckland, Okahu is a convenient place for natives to live on who desire to have intercourse or trade with Europeans; and Apihai seems to have extended free and unquestioning hospitality to all who chose to come.

I stated, during the progress of the trial, that the Court had made a practice not to attach much importance to the purchases made by the Government as evidencing any title in the sellers. It was the duty of the Land Purchase Commissioner to obtain land that could be immediately and peaceably occupied by settlers; and when a chief came to demand payment for an estate, backed by a sufficient following, it was found more expedient to satisfy his claim than to contest it. The rule which has governed the Court on this point is that, if on land being sold to the Government a tribe made no claim, it might be received as a very strong evidence that it had none, but if it made a claim, and it was recognised, that fact afforded very slight evidence that the claim was a good one. The sale of all the land from Taurarua to Te Whau affords, to my mind, no evidence that the sale was a rightful one; on the contrary, I think it was not. The sale of Taranaki by Potatau, to which Mr. Gillies compared the sale by Ngatipaoa, was much better justified, for we have had evidence in this case of a conquest made by him of the people of that country; but even that sale did not avail the Government much.

The "Kupu" of Herua as it is called—that is, the permission alleged to have been given by Kahukoti—is put forth by Ngatipaoa as the reason why they have during more than a quarter of a century made no protest against Apihai's continued occupation of this land, and that they put it on one side now simply because Apihai is claiming a Crown grant. It is not a matter of much moment, but it certainly is remarkable that neither this permission nor anything connected with it, or with the land, was alluded to at the return visit of Kahukoti to Okahu, or on the occasion of Haora Tipa visiting Apihai and presenting him with the paddle and tomahawk, representatives of his dead relations, or on the other numerous occasions when the chiefs of the tribes saw each other. Heteraka seems to have treated the "Kupu" with less respect, for he agitated

about his claim in early days, but the Court is not told whether he connected Ngatipaoa with it.

HETERAKA TAKAPUNA.

The case of Heteraka Takapuna has been very carefully considered, not only because the Court felt itself called upon to devote more than usual time and thought to a case on which so much labour has been expended by the parties, but also because it desired to discover or to recognise the facts or principles in the case which called forth so much energy and skill. But the Court has made the endeavour in vain. Of all the claims which we have been called upon to consider, we think Heteraka's is the weakest, and the only obscurity that could possibly surround it is caused merely by the immense mass of facts which have been connected with it, and which render it difficult to ascertain its real character.

It is impossible to review all the evidence brought forward in support of Heteraka's claim, but as he was himself examined, and gave a full statement of his case, I will as briefly as possible notice some things that he said, because the case as put forth by him differs in important particulars from that elaborated by his counsel:—He commences with the early times, and states that the first inhabitants of this country were destroyed by Ngatiwhatua. "Ngatiwhatua is the tribe that I know attacked Waiohua; I mean Te Taou. Te Taou destroyed Ngaiwi, also Ngatiwhanaunga,—and for another reason. I don't know of any others." And on cross-examination the next sitting-day he stated that the Thames tribes, naming them all, are the people who slaughtered the original inhabitants, and added that he had been scolded in the interval for making the previous statement.

"I was born at Orakei."

Two witnesses, one of whom was grown up and both living when Heteraka was born, contradicted this. Paramina says: "I know where Heteraka was born. He was born at Whaitere, in Kaipara. I was living there at the time. He was grown up when he left Kaipara. He left Kaipara on account of a squabble with another boy, Te Po. They quarrelled about fern root. Then he and his father Purehurehu left. There is no doubt about his being born there. I knew Heteraka's mother, Tahikura." She was of Ngatiwhatua, hapu Tematarahurahu. Heteraka admits having lived with his mother at Kaipara as a child, and that his mother lived there before she was married, and that in fact his father went there to marry her, and remained there some time, but came down to Orakei, apparently to give birth to him, returning immediately afterwards.

This may be true, but Heteraka says also that his brothers and sisters were born there. Now, remembering that he states that his father and mother were married at Kaipara, and remained there some time after their marriage; that he was the first-born, that they were *again at Kaipara when he* was knee-high; that, as he says in another *place, "She was a young* woman when she went there, and an old

woman when she came away—when they had to leave about the Te Po quarrel; that they then went to Te Weiti, and from there to live amongst the Ngatipaoa, whence they went to Waikato, where his mother died; it is difficult to see how the latter part of the statement as to his brothers and sisters can be true. I think the evidence against Heteraka's statement as to his place of birth is to be preferred, though not as decisive as that relating to Hehewa's burial place.

On cross-examination the following questions were put and answers made :—

Has Te Kawau any claim to Orakei?—No.

Has Te Taou any claim?—No.

Has Te Taou any claim to any land about here, from Onehunga to Waitemata?—Kaore i eke. Formerly they had not, but in consequence of their fighting they have.

Did Te Taou own Te Pukapuka?—No.

Or Purewa?—No.

Or Queen-street?—No.

Or Remuera?—No.

Did Apihai's people own any of these?—Formerly, until now they have no claim.

Whose were the lands from the Tamaki to Te Whau before the Government came?—Ngatipaoa's.

Did not Ngatiwhanaunga join?—Yes.

Is the claim of Ngatipaoa, Ngatiwhanaunga, Ngatitamatera, and Ngatimaru of equal goodness, i.e., on the same grounds?—Yes, there is one "take."

Have they always had this claim?—Yes, long before the fighting.

Had Apihai and his people never any claim?—None whatever.

Now this appears to the Court extravagant, and represents a position that very wisely was not taken by Heteraka's counsel.

He tells us in another place of Te Hehewa having held Taurarua with his Waiohua, and having evacuated it and handed it over to Ngatiwhanaunga.

In either case, the question occurs to my mind what became of the defenders—whoever they were—when Ngatiwhatua assaulted the place and killed all the inhabitants?

How far did the Waiohua estate extend?—It went to Wakatiwai and on to Cape Colville.

And then he stated that he had made no appearance at the Land Courts recently held at Kauaeranga. It appears that Ngatipaoa are not as ready to admit the Waiohua title to the Thames country as they are to the more westerly portion of the estate as described by Heteraka. He then goes on: "The Waiohua estate goes north to the Wairoa at Tauranga, and south to Patetere on the Waikato river. The Waitaha and Ngariki come into that." And in reply to the *question,* "Why don't you occupy that estate?" he says, "The *original inhabitants* were slaughtered and the intruders kept possession. *I am the real* owner. I am the only Ngatitai left."

It would be very difficult to reinstate Heteraka in these dormant rights.

Who is the true representative of Ngaiwi now alive?—Te Hapimana, Heteraka, and the children of Isaac. Paerimu would represent Ngaiwi equally with Te Hapimana.

But Paerimu is admitted by himself to be a Waiohua, and by all *Apihai's* witnesses to be the true representative of the people originally conquered by Te Taou.

Did you not say at the previous trial that you were a Ngaiwi?—I said so.

Who built Taurarua Pa?—Rangikaketu and Te Hehewa.

Did Te Hehewa live there?—Yes.

Why did he leave it?—He left it, and gave it to Ngatiwhanaunga with the land. The pa was attacked. It was attacked by Ngapuhi, and by no one else.

Mr. Gillies admitted that Ngatiwhanaunga had no ground of claim superior to or different from that of the other Thames tribes; and all the Thames witnesses, as well as Heteraka himself in another place, said that the "take" was the same, and their claims were all equal. In setting forth an attack on Taurarua by Ngapuhi, and concealing that by Ngatiwhatua, Heteraka tells us of an event which is nowhere else disclosed, and ignores another about which there is no doubt.

You said you were living at Orakei before Koperu's attack?—I lived there from the time I was born until Koperu came.

Had you no other home all that time?—I used to reside there and at Mauinaina Pa.

He here forgets his previous statement that he was living at Kaipara with his mother from the time she was a young woman until she had become an old one.

What is the history of Ngatipaoa's ownership of Taurarua?—*Waiohua* ancestorship, and the conquest by Kapetawa.

Ngatipaoa being driven out of Waikato, was this by Te Waharoa?—I did not say they were driven off; we came quietly away.

I often wished, during the progress of the trial, that there had been a jury, so that the Court might have been relieved of that part of their duty which is comprised in determining facts, and judging of the credibility of witnesses; but, having to perform this function, I ought to express that the Assessor felt equally with myself that Heteraka's evidence made on our minds an unsatisfactory impression.

The question of Heteraka's ancestry, as set forth in his genealogical table, has already been partially dealt with.

The Court is of opinion that his pedigree is in no way connected with any tribe who ever held possession of this land, or of any part of Tamaki on this side of the river. It is the pedigree of Ngatitai, Ngatipoataniwha, Ngatikahu, and partially of the Thames tribes. It will serve to explain the connection existing between Heteraka and those tribes, but is of no other value, as far as this case is concerned. *Mr. Gillies urged the Court* to disregard pedigrees; and I cannot but

brought forward, and should be very reluctant to admit a principle which would be so very unsafe as a guide, and so liable to abuse as a document which carries with it no intrinsic evidence, and which must depend for its force, and even its character and interpretation, on oral testimony and tradition. But the necessity to decide this point does not arise. It belonged, Heteraka tells us, to Teke, a wife of Te Hehewa. She was the last person seen with it, and she hid it—Heteraka does not know where. So that Heteraka has not the possession of this document, and it cannot be produced, nor does Heteraka appear to be entitled to the possession of it, for the woman Teke was not his grandmother, but another wife of Te Hehewa's. However, it was buried last century, and with it must be taken to be buried whatever "mana" it possessed. Nor do we hold that the title to Tamaki will be revived for the benefit of the person who may happen hereafter to find it as Kahotea was found.

The newspaper correspondence is not before the Court, and the interviews with Mr. De Thierry and others resulting from that correspondence do not, in our judgment, affect the aspect of the title as it was before that period. The evidence as to what passed is conflicting. The jealousy which is still evident between the pure Taou and the Ngaoho, and more markedly the Uringutu, appears to have been more demonstrative then than at any other time, and it was fostered by Mr. De Thierry; but we do not think that any concessions were made by Mr. MacCormick's clients. Where the accounts differ, we prefer that of the claimants; and we hold that no alteration in the status of the parties could have been then made, except by voluntary and mutual agreement, and certainly no such agreement took place.

The Court quite agrees with Mr. Gillies that Heteraka has kept his claim alive. And we also concur that the Court should "imagine itself to be sitting in 1841," and we have endeavoured to do so. Doubtless the 30 years' possession by Apihai must be allowed to have weight, but principally because we find that it has been undisputed except by Heteraka, whose right to dispute has been considered, and because we find that that possession was founded on anterior rights which have never been overtly questioned until now (except as abovenamed by Heteraka). We can easily imagine cases where equally undisturbed possession for an equally long period would avail nothing in this Court, where there is nothing on which it is based; and we have even such cases appearing in this trial, where indeed no claim is urged; as, for example, Te Hapimana and Te Keene Tangaroa. It would be a very dangerous doctrine for this Court to sanction that a title to native lands can be created by occupation since the establishment of English sovereignty, and professedly of English law, for we should then be declaring that those tribes who had not broken the law by using force in expelling squatters on their lands, must be deprived "pro tanto" of their rights. The precedents are all the other *way, and are founded in* reason. And as no Court existed in the *country by which such* trespasses could be tried and the true owner-

ship of land ascertained, a peaceful protest against the occupation, or an assertion of a hostile or concurrent right made at a sufficiently early period, must be held to have been all that the counter-claimant was required to do to keep alive his rights, and indeed all that he lawfully could do.

But giving Heteraka the full benefit of this doctrine, and imagin*ing ourselves* to be sitting in 1841, we think that his case would be *no stronger* then than it is now. In fact, the Court is of opinion *that* he never had any title to or interest in this land, nor even a "scintilla juris;" and that he has no more now. His claim is therefore dismissed both as concerns himself and all who claim by, with, or under him.

APIHAI'S CLAIM.

The claim of Te Taou, Ngaoho, and Te Uringutu will now need short notice. The epitome of the evidence read with the table of ancestry, and combined with the part of this judgment which has gone before, will sufficiently explain their status. But it ought to be noticed that of seventeen native witnesses called by Heteraka not one is out of his own tribe or disinterested, while of twenty native witnesses called by Apihai nine have no claim on the estate. This case is briefly this: Te Taou—a tribe resulting from the union of a Northern tribe with an ancient tribe called Ngaoho—came down from Kaipara for reasons which have been previously stated, exterminated the tribes that occupied this isthmus, entered into possession of the empty country and settled down permanently, and here they have ever since remained, except during periods of hostility, during which the surrounding land was evacuated as being unsafe to live in, always returning as soon as the danger ceased.

Shortly before and about the time of the arrival of Governor *Hobson*, European evidence is imported into the case: Mr. George *Graham*, Mr. Shearer, Mr. Robertson, Mr. Smith, Captain Wing, Captain J. J. Symonds, Mr. Blake, and Mr. George, all of whom—with one exception, Mr. George Graham—more or less corroborate the fact by their recollection of different circumstances, that Apihai's people, under their generally-known name of Ngatiwhatua, were the sole resident natives here and on this part of the shores of Waitemata at the time of the Governor's arrival, and that they had houses and cultivations at Auckland and at Okahu. The arrival of the English power found them domiciled at Okahu in undisputed possession, and thus they have remained ever since as the dominant lords of the soil.

The Court has found that there are no concurrent rights or titles which ought to diminish their estates or interests; and it therefore decides that one or more certificates of title shall issue in favour of these tribes, or in favor of such persons comprising them as shall be determined upon on hearing further evidence, or as shall be agreed to amongst the members of the tribes.

It only *remains for me to* thank the learned counsel engaged in

this case for the great time and care which they have bestowed upon it, and for the very complete and able manner in which it has been placed before the Court. I also thank them for the patience with which they have listened to this long judgment. I could not, satisfactorily to myself, have made it shorter without the expenditure of more time than I have at my disposal. I cannot suppose that every fact which I have detailed is correct, or that the Court has in all cases accurately stated the evidence; but I beg the parties to believe that the evidence has been read and re-read with great care, and that in all probability those particular portions which they may think to be wrong have in fact been taken from other and contradictory testimony. The vast value of the rights at issue (proved in evidence to be £50,000), no less than the example of the several counsel, demanded this care from the Court.

NATIVE LAND COURT.

OHINEMURI, 1st June, 1870.

HENRY A. H. MONRO, ESQ., *Judge;* WIREMU MITA HIKAIRO, *Assessor.*

OWHAROA.

THROUGH a cloud of evidence, a vast deal of it irrelevant, and most of the rest absolutely contradictory, the Court clearly sees these facts:—

1st. That Ngatitara conquered certain lands near Ohinemuri and settled on them; and that if, as has been asserted, but not proved, these tribes were the *rahi* of Ngatitamatera, that does not alter the case, since they did not offer to protect them or sustain their rights, if they had any, against their connections the Ngatitara.

2nd. That before the Ngatitara could have advanced to attack Ngamarama in their strongholds at Waihi, they must have been in occupation of Owharoa, through which they had to advance, and by which their only retreat lay.

3rd. That they have never been dispossessed by an enemy.

This being so, the Court cannot admit that they were deprived of the land by their friends. At all events, they cannot rightfully be so deprived now; and it is clear that they have been in occupation until a comparatively recent period.

The great effort of the opponents' counsel was to establish the absolute serfdom of the Ngatitara to Ngatitamatera; and some degree of subordination seems to have been proved, but principally by the evidence of modern facts. Had the fact, however, been fully proved, the Court could never admit that such a position—particularly when not arising out of a conquest—necesarily involves the disherison of the *rahi* of all their lands, and the vesting them in the hands of the chiefs of the dominant tribe. It has been admitted on all hands that there never has been fighting between the two parties; on the contrary, it has been shewn by their opponents that their friendship was first broken by the discussion in respect of leasing the land for gold mining, and it has been shewn that their ancestors were equal. If, then, the weaker were in quiet possession of lands before they sought the assistance of the stronger to avenge their losses by the conquest of other lands, and they remained for ever after in friendship, albeit the weaker might be more or less subordinate to the superior, and whatever may be the right of the protecting tribe in the land conquered by them, the Court cannot see how the protected tribe can have become dispossessed of their original lands.

Judgment must therefore pass in favour of the claimants.

NATIVE LAND COURT.

OHINEMURI, 29th October, 1870.

HENRY A. H. MONRO, ESQ., *Judge;* HARE WIRIKAKE, *Assessor.*

WAIHI.

THIS case, which has occupied the Court for the last eight days, is a claim preferred by the Ngatitara tribe to a piece of land called Waihi—the opposing claimants being the Ngatitamatera. The evidence, for the most part tradition, is more than ordinarily contradictory; both parties, however, are agreed upon one thing—that the district in which the block is situated belonged in former times to a tribe called the Ngamarama, and was taken from them by conquest. The Ngatitamatera witnesses say that the first fighting was begun by Ngatitara, who, under Tikitearoha and other chiefs, went to attack the Ngamarama pa at Otawhiwhi, near Katikati, where, instead of gaining a victory, they were defeated with great slaughter. The Ngatitamatera assert that only three out of the whole war-party escaped alive. The Ngatitamatera, who were at this time living at Hauraki, were appealed to by a Ngatitara woman named Hinewaha to avenge the death of her relations. A large war-party mustered under the chiefs Te Kiko, Te Poporo, and others. They proceeded to Owharoa and were there joined by a chief of Ngatitara named Te Whakamaro. At Te Rau-o-te-whero they divided their forces, one party under Te Poporo going south to attack Kouturahi, the other going north to attack the Tawhitiareia pa, which stood upon the block of land now under investigation. Te Kiko's party stormed and took the Tawhitiareia pa and slaughtered the defenders, after which the land was divided among the conquerors. In subsequent battles the Ngatitamatera say they entirely destroyed the Ngamarama, took possession of the whole district, and have remained in possession up to the present day.

The witnesses on the side of the Ngatitara state that their ancestors made war upon the Ngamarama, that they defeated them at Koukaro and Koriori, and took possession of that part of the country; that then an intermarriage took place, and peace was made. That a section of the tribe occupied the land they had seized, and that an arrangement was made with the Ngamarama to the effect that one end of the district should be *tapu*, and the other open for war. The peace was not of long duration; war broke out again between the two tribes and Tara's son, Tikitearoha, went with a war-party to attack the Ngamarama at Otawhiwhi. Here the Ngatitara witnesses corroborate the account given by the Ngatitamatera as to

the defeat of Ngatitara, and the appeal to, and subsequent successful expedition of, the Ngatitamatera, the only discrepancy being as to the number of Ngatitara who escaped from Otawhiwhi and the number that joined Te Kiko. The Ngatitara state that those of their tribe who were in occupation of land at Waihi remained there during the whole of the fighting, and continued in occupation after Tawhitiareia had been taken, and that the only land taken by the Ngatitamatera was the site of the Tawhitiareia pa. They therefore claim the land as part of their original conquest from Ngamarama.

It appears to the Court to be beyond the bounds of probability that any small number of Ngatitara should have remained in occupation of Ngamarama land, by right of conquest, after the crushing defeat received by their tribe at Otawhiwhi; or that one end of the district should have been at peace while a war of extermination was going on at the other. If the Ngatitara obtained a footing on this land at all at the time they state—which is extremely doubtful—they must have been expelled after the defeat of their tribe at Otawhiwhi. And that the Ngamarama were in possession is evident from the fact that when the Ngatitamatera came to avenge the slaughter of Ngatitara they were residing in their pas at both ends of the district.

It was stated in the case of Owharoa that a considerable period elapsed between the defeat of Ngatitara at Otawhiwhi and the taking of Tawhitiareia, so that the Ngamarama must, during the whole of that time, have been in undisturbed possession of the land said to have been conquered; and, but for the expedition of Ngatitamatera, might have remained in possession up to the present day, so far as Ngatitara were concerned That one end of the district was *tapu* and the other left open for war is disproved by the fact that when the Ngatitamatera war-party divided at Te Rau-o-te-Whero, the Ngatitara chief Te Whakamaro joined Te Kiko's party in the attack on Tawhitiareia instead of going with Te Poporo to attack Kouturahi, as he could have done had it been so. The account given by the Ngatitara as to their numbers is altogether unreliable. That they were reduced to a state of great weakness after Otawhiwhi is apparent from the fact that after that battle they were dependent on Ngatitamatera for the redress of injuries sustained at the hands of other tribes.

The evidence given by Tupeka as to the attack of the Ngatitara chief, Te Autororo, upon the Ngamarama, after the battle of Otawhiwhi, and the utter destruction of himself and party, tends much to strengthen the Ngatitamatera case. It is the opinion of the Court that the Ngamarama, after Otawhiwhi, recovered possession of these lands, and whatever the Ngatitara may have gained previous to Otawhiwhi they entirely lost after their defeat at that battle, and that subsequently the Ngatitamatera, in Maori fashion, extinguished the Ngamarama title. This seems borne out by the fact that the only disputes about these lands of late years have been between *the Ngatitamatera* and Ngaiteraugi. At the last Court the

case of Owharoa was decided in favour of Ngatitara, but the cases are by no means parallel. There, the Ngatitara undeniably conquered the original owners, took possession of the land and remained in possession. Neither before nor after Otawhiwhi did it appear that the tribe from whom it was vested made any attempt to recover it and the Ngatitamatera had never dispossessed Ngatitara, though doubtless, being the superior tribe, they could have done so had they been so disposed.

The right of conquest by Ngatitara being disposed of, the next question is that of occupation; and here, although we have facts and not tradition to deal with, the evidence is still more contradictory, each party asserting that they cultivated on the land, and that the other did not. The Court is of opinion that the occupation of Waihi by Ngatitara since 1865 was by direction or invitation of Te Hira, as we have direct evidence to that effect, but as some of them appear to have lived on the land previous to that under the protection of Ngatitamatera (as otherwise the Ngaiterangi, who claimed that part of the country, would have dispossessed them) the Court considers that they are entitled to their cultivations, and awards them the fifteen acres round their settlement. Certificates for the remainder of the block will be ordered in favor of the Ngatitamatera.

NATIVE LAND COURT.

WELLINGTON, 25th September, 1869.

F. D. FENTON, ESQ., *Chief Judge*; F. MANING, ESQ., *Judge*; and IHAIA WHAKAMAIRU, *Assessor*.

RANGITIKEI-MANAWATU LAND CLAIMS.

THIS is a claim made by a native named Akapita for himself and others to certain lands situated between the Manawatu and Rangitikei rivers, and which has been referred to the Native Land Court by the Governor, under the provisions made to that effect by the "Native Land Act, 1867."

The claimants ground their title firstly on conquest, stating that the land in question was conquered from the Ngatiapa tribe, the original possessors, by the Ngatitoa tribe under their chief Te Rauparaha, who subsequently gave, or granted, this land to the Ngatiraukawa tribe, his allies, of which tribe the claimants are members; and secondly, failing the proof of the right by conquest, the claimants claim under any right which it may be proved the Ngatiraukawa tribe, or any sections or hapu of that tribe, may have acquired either by occupation or in any other manner.

This claim by Akapita is opposed by the Crown, who have purchased from Ngatiapa, on the grounds that the original owners, the Ngatiapa, have never been conquered, and that the Ngatiraukawa as a tribe have not acquired any right or interest whatever in the land, and, moreover, that the land claimed by Akapita is now the property of the Crown, having been legally purchased from the right owners.

A great mass of evidence has been taken in this case, from which, after eliminating minor matters and everything which has no very important bearing on the matter for decision, the following facts appear to remain.

Before the year 1818, and to that date or thereabouts, the Ngatiapa tribe were possessors of the land in question, its owners by Maori usage and custom, the land being a part of the tribal territory or estate.

On or about the above date the chief Rauparaha, with the fighting men of his tribe and a party of Ngapuhi warriors armed with firearms, left his settlement at Kawhia and marched to the South with the intention of acquiring by conquest a new territory for himself and tribe. In the course of this expedition he passed through the country of the Ngatiapa, remaining only long enough to ravage the country and drive back to the fastnesses of the mountains, the Ngatiapa, who, with some parties of allies or kindred tribes, had attempted resistance, but were at that time obliged to retreat before an enemy armed with firearms.

The invaders then passed on to the southward, and after a series of battles, onslaughts, stratagems, and incidents attendant on Maori warfare, but not necessary further to notice here, Te Rauparaha, with the assistance of his Ngapuhi allies, succeeded in possessing himself of a large territory to the north and south of Otaki, the former possessors of which he had defeated, killed or driven off.

After this inroad, in which Rauparaha had laid the foundation for a more permanent occupation and conquest, and being therefore, as it would appear, desirous to collect around him as many fighting men as possible—a great object of every native chief in those days of continual war and violence—he returned to Kawhia with the purpose of collecting the remainder of his tribe who had been left at Kawhia and of inviting the whole tribe of Ngatiraukawa to come and settle on the territory which he had then but partially conquered.

It is to be noticed here that on the return of Rauparaha to Kawhia he was met by the chiefs of the Ngatiapa tribe on their own land, and that upon this occasion friendly relations and peace were established between them, he returning to them some prisoners he had taken in passing through their country when advancing to the southward; presents were also exchanged, and the nephew of Te Rauparaha, Te Rangihaeata, took to wife with all due formality a chieftainess of the Ngatiapa tribe called Pikinga, notwithstanding that she had been taken prisoner by himself on the occasion of the first inroad into the Ngatiapa country.

After arriving at Kawhia the Ngapuhi returned to their own country, and need not be again mentioned, as they have not made any claim on account of their alliance with Te Rauparaha on the occasion of the first invasion.

About a year after the return of Rauparaha to Kawhia he mustered his tribe and some other followers, and taking also the women and children, he again marched for the South, with the intention of permanently occupying and securing the conquest of the lands which up to this time he had merely overrun.

The effect of the invitation by Te Rauparaha to the Ngatiraukawa tribe to come and settle on his newly acquired lands was, that soon afterwards strong parties of Raukawa came from time to time to Kapiti, partly to examine the new country which had been offered to them, but chiefly, it would appear, moved by the reports which they had heard that gunpowder and firearms were procurable at the place from European traders who, about that time, had commenced a traffic for flax and other native produce. These parties of Raukawa, on their way South, in passing through the country of the Ngatiapa, killed or took prisoners any stragglers of the Ngatiapa or others whom they met with, and who had lingered imprudently behind in the vicinity of the war track, when the prudent but brave war chief of the Ngatiapa had withdrawn the bulk of the tribe into the fastnesses of the country whilst these ruthless invaders passed through, being doubtless unwilling to attack the allies of Te Rauparaha, with whom he wisely made terms of peace and friendship. In

passing through the country of the Ngatiapa these Raukawa parties also took a kind of *pro forma*, or nominal, possession of the land, which, however, would be entirely invalid except as against parties of passing adventures like themselves who might follow; because the Ngatiapa tribe, though weakened, remained still unconquered, and a considerable proportion of their military force still maintained themselves in independence in the country under their chief Te Hakeke. But what was no doubt fully as much in favor of the Ngatiapa tribe, and which may probably have been the cause of their not having been eventually subjugated, was the fact already noticed, that Rauparaha on his return to the North, when he invited the Ngatiraukawa to come down, had made peace with the Ngatiapa, thereby waving any rights he might have been supposed to claim over their lands; and indeed from that time for a long period afterwards, friendly and confidential relations undoubtedly were maintained between Te Rauparaha and his tribe and the tribe of Ngatiapa,—which were only broken off, more by accident than by design of either party, in consequence of a few men of the Ngatiapa having been killed in an attack made by Ngatitoa and others on a fort belonging to the Rangitane tribe in which these Ngatiapa men happened to be staying at the time, and whose death was afterwards avenged by the Ngatiapa—after which peace was again established between them and Te Rauparaha and the Ngatitoa tribe.

To Europeans not much acquainted with the peculiarities of Maori thought and action, the destruction by these passing parties of Ngatiraukawa, of individuals of the Ngatiapa tribe—a tribe with whom Rauparaha was then on peaceful and even friendly terms,—their destruction by parties who were not only also allies of Rauparaha, but who were then actually in expectation of receiving from him great benefits in the shape of grants of land, and above all the opportunity of trading for firearms, may appear a strange inconsistency, and not to be reconciled with the fact of the people so treated being in any other position than that of helpless subjection, and not—as has been seen—in alliance with the paramount chief, Rauparaha; but to those who know what the state of society (so to call it) was in those days, and have noted the practical consequences arising therefrom, this matter presents no difficulty. The Ngatiraukawa parties would, as a matter of course, act as they did without anticipating any reference whatever to the matter by Te Rauparaha, to whom they were bringing what he most wanted, a large accession of physical force, and who would not therefore have quarrelled with them at this time for such a small matter as the destruction of a few individuals, no matter who they were, provided they were not of his own particular tribe. It was the pride and pleasure of the Raukawa to hunt and kill all helpless stragglers whom they might fall in with on their march; it was customary under the circumstances, and being able also to do it with impunity, they were, according to the morality and *policy* of those times, quite within rule in doing so. *As for the Ngatiapa tribe* themselves, they would not at all blame the

Ngatiraukawa in the sense of their having done anything wrong; being Maori themselves, they would appreciate the circumstances of the case, knowing that they themselves would have done the same if in the same position. They would also fully understand the reason why the paramount chief Rauparaha could not notice the matter, and that in fact the Ngatiraukawa had done nothing to be considered as wrong or out of order, but only something to be returned in kind and with interest at some future day, provided that the Ngatiapa should ever be able, and that it would be good policy in them to do so when the opportunity offered. I have made these remarks, which are applicable to the actions and proceedings of all the different Raukawa parties when on their way South to join Te Rauparaha at Kapiti, for the purpose of showing that no acts of the Ngatiraukawa tribe, previous to the arrival of their whole force at Kapiti, whether by killing or enslaving individuals of the Ngatiapa, or by taking a merely formal possession of any of their lands, without halting or residing, did give them (the Ngatiraukawa) any rights of any kind whatever over the lands of the Ngatiapa tribes according to any Maori usage or custom.

It should be noted here, that on the first coming of Rauparaha on his expedition of conquest, he found living amongst the Ngatiapa, a party of Rangitane, a tribe whose proper tribal lands were adjacent to, but distinct from, those of the Ngatiapa. These people, upon the second coming of Rauparaha on his return from the North, were still there, and they, in confederation with some other people of the Muaopoko tribe, did, by means of a treacherous stratagem, very nearly succeed in killing Te Rauparaha, who barely escaped by flight, leaving four of his children, and all, or very nearly all, of his companions, dead at the place where they were attacked. This affair occurred after Rauparaha had made peace formally with the Ngatiapa tribe, who, it is in evidence, had warned him against the treacherous design of the Rangitane and others; notwithstanding which the Rangitane very nearly succeeded in ridding themselves of the most dangerous of all their enemies, Te Rauparaha—famous himself for wiles and stratagems —and who, it is pertinent to the matter in hand to remark, either conquered by force or made tools of by policy, or destroyed by treachery, almost everyone he came into contact with. The Ngapuhi warriors, strong in warlike ability, doubly strong in being armed with firearms, he made use of to conquer for him a great territory, and then dismissed them, paying them for their great services with friendly flattering words, a few prisoners, and some insignificant presents. The Ngatiapa he spared and made friends with, and even allowed to purchase firearms at Kapiti, evidently with the purpose of using this tribe as a check upon his friends the Ngatiraukawa, who were much superior to his own tribe in numbers, and who in their turn were to be pitted against the numerous enemies by whom he was surrounded, and who had become so in consequence of his recen conquests. The effect however of the nearly successful attempt by the Rangitane, as regarded themselves, was to prevent Te Rauparaha

from extending to them the same favourable consideration which he had done to the Ngatiapa, and to cause him to pursue them with persistent and vindictive warfare, slaughtering a great proportion of their fighting men, breaking their military force, and driving them from place to place whenever opportunity offered, during which operations we lose sight of them on this block; and when we afterwards find a small company of people called "Rangitane," settled unopposed and apparently in a permanent manner at Puketotara, just within the country of the Ngatiapa, and not far from the boundary of the proper tribal estate of the Rangitane tribe, we find on investigation that these people are called "half-castes" or children of inter-marriages between members of the Ngatiapa and Rangitane tribes, and who, there is no doubt, owed their undisturbed possession to their Ngatiapa blood. I am therefore of opinion that in the decision to be given as to the ownership of the whole block, these people holding land within the Ngatiapa boundaries by virtue of their Ngatiapa blood, and for that reason unopposed by the Ngatiapa, should be held to be members of the Ngatiapa tribe and have all the rights which may accrue to them from that position, and that when the Ngatiapa tribe is spoken of for the purpose of the decision in this case it shall be understood to include these Rangitane half-castes.

For the sake of brevity and perspicuity, I have avoided as much as possible, recurring to many minute circumstances, seeing that the questions under consideration can be decided, as far as the Court can decide them, on the evidence adduced, on broader considerations, which are more easily understood. I now therefore pass at once to the time, about the year 1829, when we at last find the whole emigration of the Ngatiraukawa tribe arrived and settled about Kapiti, Waikanae, and the immediately adjacent country.

The whole Ngatiraukawa emigration having arrived, it appears that they did not immediately disperse themselves over the conquered country, but remained for about three years in the vicinity of Otaki, Waikanae, and Kapiti, where they employed themsleves in manufacturing flax and producing other commodities for sale to the European traders for gunpowder and fire-arms, without which they could not count on being able to establish themselves on their allotted lands; but, having at last accomplished this object, the different sections of the tribe separated, and each section went to, and took possession of, and settled on, that particular portion or district of the conquered country which had been granted or allotted to them by the paramount chief Rauparaha.

During the above period of time, between the arrival of the Ngatiraukawa tribe and its final occupation in sections of the different districts allotted to them, it appears that the Ngatiapa had also, with the full consent of Rauparaha, and the active assistance of the chief Rangihaeata, made the most of the time in arming themselves with firearms, which, it would appear, they succeeded in doing to fully as great an extent as their means of purchasing allowed, and probably to *fully as great an extent* as the Ngatiraukawa had been able to do.

This fact has a very significant though indirect bearing on the questions at issue, as it seems evident that had Rauparaha intended to depress or subjugate the Ngatiapa tribe, he would on no account have allowed or offered facilities to their war chief Hakeke in coming to Kapiti with parties of his young men to procure those arms, which, were it not for the friendly relations subsisting between them, would have made the Ngatiapa formidable even to Te Rauparaha himself. The policy, however, of Te Rauparaha was evidently, from the beginning, after having made the Ngatiapa feel his power, to elevate and strengthen them as a check on his almost too numerous friends the Ngatiraukawa, whom, were it not that they were bound to him by a great common danger, created by himself in placing them on lately conquered lands, he would never have trusted. He has also evidently had the intention, and succeeded in it, after having made peace with his enemies in the South who were not likely to attack him again, of setting up both tribes, Ngatiraukawa and Ngatiapa, as a barrier against his far more dangerous enemies in the North.

There, however, is no evidence at all to show that Rauparaha, in granting or allotting lands to the different sections of the Ngatiraukawa tribe, did ever give or grant to them any lands within the boundaries of the Ngatiapa possessions, between the rivers Rangitikei and Manawatu, or elsewhere; to have done which would have been clearly inconsistent with the relations then subsisting between himself and the Ngatiapa tribe, over whose lands he had never claimed or exercised the rights of a conqueror; and, moreover, the Ngatiapa, a fierce and sturdy race, were on the land, no longer unarmed but well provided with those weapons, the want of which had, on the occasion of the first invasion, reduced their warriors to seek reluctantly the shelter of the mountain or the forest. It is, however, sufficient that we have the fact that, influenced by whatever motives, Te Rauparaha did not at any time give or grant lands of the Ngatiapa estate, between the Manawatu and Rangitikei rivers, to the Ngatiraukawa tribe, nor is there any evidence to show that he had ever acquired the right to do so. It is however a fact that soon after the year 1835, we find three distinct hapu of the Ngatiraukawa tribe settled peaceably and permanently on the Ngatiapa lands, between the Manawatu and Rangitikei rivers, unopposed by the Ngatiapa, on terms of perfect alliance and friendship with them, claiming rights of ownership over the lands they occupied, and exercising those rights, sometimes independently of the Ngatiapa, and sometimes conjointly with them; joining with the Ngatiapa in petty war expeditions, "eating out of the same basket," "sleeping in the same bed," as some of the witnesses say, and quarrelling with each other, and, on the only occasion on which the disagreement resulted in the loss of one life, making peace with each other like persons who, depending much on each other's support, cannot afford to carry hostilities against each other to extremity, and who therefore submit to the first politic proposals of their chiefs for an accommodation. Upon investigation of the causes which brought about this

state of things, with the view of ascertaining what was the real status or position of the three Raukawa hapu on the land, we find that they did not make their settlement on the lands of the Ngatiapa by virtue of any claim of conquest, or any grant from Rauparaha, or by any act or demonstration of warlike powers by themselves; but it is *in evi*dence, which from all the surrounding circumstances seems perfectly credible, that two at least of these Raukawa hapu, namely, Ngatiparewahawaha and Ngatikahoro, were very simply invited to come by the Ngatiapa themselves, and were placed by them in a position which, by undoubted Maori usage, entailed upon the incomers very important rights, though not the rights of conquerors. The third hapu, the Ngatikauwhata, appears to have come in under slightly different circumstances. The lands allotted to them by Rauparaha were on the south side of the Manawatu river, the lands of the Ngatiapa were on the north, and, to quote the very apt expression of one of the witnesses, "they stretched the grant of Rauparaha and came over the river;" the facts appearing in reality to have been that they made a quiet intrusion on to the lands of the Ngatiapa, but offering no violence, lest by so doing they should offend Rauparaha, as, under the then existing established relations between the tribes, to do so would have been a very different affair from the killing of the stragglers they met with several years before on the occasion of their first coming into the country. The Ngatiapa, on their part, for very similar reasons, did not oppose the intrusion, but making a virtue apparently of what seemed very like a necessity, they bade the Ngatikauwhata welcome, and soon entered into the same relations of friendship and alliance with them, which they had entered into with the other two sections of Raukawa. That this was the true tsate of the case seems very certain, for in those times of murine, violence, and war, when men could only preserve their lives and the trifling amount of prosperity which under such a state of things could exist, by a constant exhibition of military strength, it is well known to the Court that all chiefs of tribes, and all tribes, particularly such as were, like the Ngatiapa, not very numerous, were at all times eager, by any means, to increase their numerical strength; and that, much as they valued their lands, they valued fighting men more, and were at all times ready and willing to barter a part of their territorial possessions for an accession of strength, and to welcome and endow with land, parties of warlike adventurers like the Ngatiraukawa, who would, for the sake of those lands, enter into alliance with them, and make common cause in defending their mutual possessions. In exactly this position we find these three Raukawa hapu, in a position which gives them (by Maori custom) well known and recognised rights in the soil. Those who, living on the soil, have assisted in defending it,—who, making a settlement, either invited or unopposed by the original owners, have afterwards entered into alliance with them and performed the duties of allies,—acquire the *status and rights* of ownership, more or less precise or *extensive, according to* the circumstances of the first settlement, and

to what the subsequent events may have been. But be the motives of the Ngatiapa whatever they were, for inviting or not opposing the settlement of these three Raukawa hapu, the fact remains that we find them in a position, and doing acts, giving them or proving that they had acquired, according to Maori usage and custom, rights which the Court recognises by this judgment: that is to say, firstly, that the three Ngatiraukawa hapu—called respectively Ngatikahoro, Ngatiparewahawaha, and Ngatikauwhata, have acquired rights which constitute them owners, according to Maori usage and custom, along with the Ngatiapa tribe in the block of land, the right to which has been the subject of this investigation.

Secondly, that the quantity and situation of the land to which the individuals of the above named Ngatiraukawa sections who have not sold or transferred their rights are entitled, and the conditions of its tenure are described in the accompanying schedule.

And the Court finds also that the Ngatiraukawa tribe has not, as a tribe, acquired any right, title, interest or authority in or over the block of land which has been the subject of this investigation.

NATIVE LANDS COURT.

April, 1871.

F. MANING, ESQ., *Judge*; HENRY A. H. MONRO, ESQ., *Judge.*

AROHA.

THIS is an application by Te Raihi and others, members of the Ngatihaua tribe, of Waikato, for a certificate of their title to a piece of land called Te Aroha, in the Upper Thames, situated on both sides of the Waihou River, and supposed to contain about two hundred thousand acres. A sketch map of the block has been laid before the Court, but as the land has not been surveyed it cannot be more particularly described. The claimants found their title on conquest and subsequent possession, continued to the present time, having, as they allege, about the year 1830, and before the establishment of British sovereignty in this country, defeated the Ngatimaru tribe and their allies of the Marutuahu confederation, at the battle of Taumatawiwi, and, as a consequence of the victory, taken the land from them, who they admit had been the owners and in possession up to that time. This claim by the Ngatihaua is opposed by Waraki, Haora Tipa, Tamati Tangiteruru, and other members of different sub-tribes of the Marutuahu tribe or confederation, who allege:—

1st. That they were not defeated at the battle of Taumatawiwi.

2nd. That they have never, in any of their contests with the Ngatihaua or Waikato tribes, lost or been deprived of the land in question.

3rd. That the Aroha block now claimed by the Ngatihaua has been, from the time of the battle of Taumatawiwi to the present date, in their possession and under their authority, without any opposition from the Ngatihaua or Waikato people, or any claim of conquest having ever been made until lately, or shortly before the first hearing of this claim in the Native Lands Court at Matamata.

And 4th. That certain persons of the Ngatihaua and Waikato tribes, who have lived on the land in question at different times, subsequent to the battle of Taumatawiwi, were only there by virtue of permission given to them by Marutuahu chiefs, with consent of the tribe, who allowed those persons to live there and cultivate, accompanying the permission with important restrictions, and giving them no right of ownership in the soil.

And, finally, that the claim of the Ngatihaua is in every part unfounded in Maori usage and custom.

The claim of the Ngatihaua is also opposed by Te Wharenui, who claims the Aroha block, or such part of it as the Court may find him entitled to, in consequence of his being descended from, and the

representative of, the Ngatihue tribe, who some generations back were the owners of the land, before the Marutuahu came into possession, but who, he alleges, were never completely ousted from the Aroha lands, and who have had always some representatives in possession to the present day, "whose fires have never been extinguished." The claim of Te Wharenui is from its nature opposed to the claims both of the Ngatihaua claimants and their Marutuahu opponents, and will be considered by the Court separately from the question pending between those two tribes.

A certificate of title has been already ordered for a piece of land called Te Raukaka, which is contained within the external boundaries of the Aroha block now claimed before the Court, and consequently nothing in this judgment must be held to have any reference to that portion of the land for which that certificate of title has been ordered.

The question at issue, separately from the claim made by Te Wharenui, is, in fact, not a question between individuals, but between the great Marutuahu and Waikato tribes, of which parties the sectional tribes, Ngatimaru and Ngatitumutumu, of the Marutuahu confederation, and the Ngatihaua, of Waikato, seem to be the most particularly interested. Before reviewing the evidence more particularly bearing on the question at issue, it is desirable to take a short glance at the history of the two tribes for a few years preceding the battle of Taumatawiwi, as gathered from evidence given in Court, and to observe their positions in relation to each other. It appears, then, that the tribes or *hapu*, who are collectively known as Marutuahu, and who oppose the Ngatihaua in this claim, did, some eight or ten years before the battle of Taumatawiwi, evacuate their own proper territory or district on both sides of the Firth of the Thames, and came and settled at Horotiu, in Waikato, by permission or invitation from the Waikato people; they also took possession of a large adjoining district, which had shortly before been occupied by the Ngatiraukawa tribe, but who had been driven off, and who had gone in search of new possessions for themselves to the South. The district temporarily evacuated, but not abandoned, by the Marutuahu tribes is very extensive, and may be approximately described as being bounded on the East by the sea coast, from a point near Tauranga harbour to Cape Colville; from thence West across the Hauraki gulf, including all the land on both sides of the River Thames to the vicinity of Auckland; from thence, an inland line in a south-easterly direction to a point on the Piako river, considerably above its junction with the Waitoa, and from thence East to near Tauranga, and then in a north-easterly direction to the commencing point. This large district, extending some eighty miles from Cape Colville in the north to the Aroha lands at the southern extremity, was at that time exposed from its position to the incursions of the Ngapuhi tribe, who were in those days the scourge of New Zealand, *and so much feared that* even the powerful, numerous, and warlike *Marutuahu tribe did not* hesitate to abandon for a time their own

country and remove to a position inland, where, if they could not escape the attacks of their most dreaded enemies, they would at least have a better chance of having notice of their approach, and be less likely to be taken by surprise. The willingness of the Waikato tribes to allow a powerful and dangerous people like the Marutuahu to enter and establish themselves in their country, seems to be due also in a great measure to their own fear of the restless and warlike Ngapuhi. No doubt they thought that the common danger to which both they themselves and the Marutuahu were exposed would cause the incomers to act as faithful allies, and that their alliance would bring them such a great accession of force as would enable them to defend their country against all comers. Events, however, did not occur as expected. Some of the Ngapuhi sections sought other and more distant scenes of war and rapine, others remained at home engaged in earnest though uncongenial labor, the labors of peace, undertaken only for the purpose of procuring the arms and munitions of war. As there was at that time probably no other tribe in New Zealand but the Ngapuhi, who could attack the united forces of the Marutuahu and Waikato with any prospect of success, these tribes found themselves for a time, as it may be said, accidentally living in peace. This time, however, the Marutuahu soon began to avail themselves of their position, with the purpose of establishing themselves in the Waikato country, and taking permanent possession, not only of the lands of the expelled Ngatiraukawa tribe, but also those of the Waikato people at Horotiu and the surrounding districts, to which they had only been permitted to come to reside in the character of friends and allies while absent from their own proper district. Before long the country was commanded by not less than twenty Maratuahu fortifications; every village had its stockaded and rifle-pitted pa, and the fierce and encroaching Marutuahu commenced a series of aggressions on the Waikato people, plundering their villages, driving them from their cultivated lands, and doing everything possible to provoke war, in which the Marutuahu hoped, no doubt, to oust the Waikato tribes from their large and fertile country. The Ngatihaua, against whom these aggressions were chiefly made, were justly famous for their valour; no tribe in New Zealand had ever or has ever outshone them in barbaric courage or warlike ability, not excepting even the formidable Ngapuhi; but they had no name for patience under injuries. Fierce reprisals were commenced; murders, skirmishes, battles, and massacres became ordinary and common events, and so this state of things continued for a length of time without either party having gained any marked advantage over the other, until at length the Ngatihaua, by what is stigmatised by their enemies as a treacherous stratagem or *kohuru*, succeeded in surprising a Marutuahu chief named Takurua in his village and massacreing him and nearly all his people, men, women, and children, to the number of about two hundred persons, at a place called Kaipaka; where, deceived by the artful pretences of the Ngatihaua and their chief Te Waharoa that they were tired of war and anxious to enter into terms of peace

and reconciliation, the Marutuahu chief and his people had relaxed that incessant vigilance which was necessary to the preservation of life. Furious at this loss, and if possible more so by the disgrace, most deeply felt, of having been outdone in deception, the Marutuahu sought revenge by isolated murders, in night attacks, in open battles and skirmishes, by every effort of force and stratagem, and notwithstanding some reverses, unprejudiced Maori authorities have held that, previous to the final battle of Taumatawiwi, the Marutuahu had balanced the loss and obliterated the disgrace. The end was, however, drawing near, at least on that stage, and the final conflict on which this claim is founded. No human flesh and blood, however hardened, could endure much longer the excitement, privation, danger, and unrest, which the equally balanced force and ferocious courage of the contending parties had now protracted to several years' duration on that small spot of the earth's surface, and between two petty divisions of the human race. War had attained its most terrible and forbidden aspect; neither age nor sex was spared; agriculture was neglected; the highest duty of man was to slay and devour his neighbour; whilst the combatants fought in front, the ovens were heating in the rear; the vigorous warrior, one moment fighting hopefully in the foremost rank, exulting in his strength, laying enemy after enemy low, thinking only of his war boasts when the victory should be won; stunned by a sudden blow, instantly dragged away, hastily quartered alive, next moment in the glowing oven; his place is vacant in the ranks, his very body can scarcely be said to exist. While his flesh is roasting the battle rages on, and at night his remains furnish forth a banquet for the victors, and there is much boasting and great glory.

Such things were, and the Court is obliged to recognize them by a passing notice, as it will be seen that some of these incidents, now only noticed in a general way, are brought before the Court, sometimes with reason and effect, and sometimes otherwise, as evidence of title to land, according to Maori usage and custom. It appears now that after this long succession of conflicts, through which the two tribes had passed without either party having gained any marked advantage over the other, they at the same time, and, as it were by common consent, made up their minds to end the contest in one great and final battle. The Marutuahu, with this view, abandoned all their scattered forts, with which the country was studded, and in the neighborhood of which many of the previous desultory engagements had taken place, and concentrated their whole force at their principal fortress of Haowhenua, so called from its great extent, and which was situated at Maungatautari, in the Waikato country, a rich territory which they had already practically seized upon, but of which they determined the result of the coming battle should leave them the undisputed owners. Besides the Marutuahu force assembled at Haowhenua, it appears that a chief, now known by the name of Te *Hira, was at the* Thames with several hundred men, but who, for *some unexplained* reason, did not come up until after the battle.

Taraia, also, one of the principal Marutuahu war chiefs, was absent at the South with many Marutuahu people on one of those expeditions which the men of those times were so fond of, enacting, from place to place, and from tribe to tribe, as they passed along, the character of the peaceful guest, the open enemy, or the flying plunderer, as opportunity, necessity, or inclination might dictate. The Waikato tribes were not slack in their preparations. Their allies, the Ngaiterangi of Tauranga, were summoned and soon appeared; the Ngatihaua and Waikato mustered their whole force, and leaving only a small number of men to garrison some of their forts, advanced, and with their allies encamped at a place called Te Tiki o te Ihi a Rangi, not far from Haowhenua, where the Marutuahu force was assembled.

It becomes necessary in this place to revert to the fact that each of the contending parties claims to have won the battle of Taumatawiwi; the Ngatihaua claimants, in fact, found their claim entirely on the consequences attending the victory, and they also make the following admissions:—1. That, up to the time of the battle of Taumatawiwi, the Marutuahu tribe were the owners of the land in question, that is to say, the Aroha block. 2. That the Marutuahu neither after the battle nor at any other time, made any cession of land, nor gave any land to them, the Ngatihaua claimants; and that the land for which they now claim a certificate of title was taken by them, of their own act, and as a consequence of the victory, circumstances arising therefrom enabling them to do so. 3. The Ngatihaua do not claim or affirm that they conquered, depressed, or at all weakened the Marutuahu tribe, or reduced its military force as compared to their own, at the battle of Taumatawiwi, although claiming the victory, and to have taken the Aroha lands as a consequence. To this the Marutuahu simply reply that *they* won the battle, and did not lose the land; that it has always been in their possession and under their authority, and that no one has ever occupied it except by express permission from themselves, and under restrictions.

As the question of who won the battle of Taumatawiwi is contested, and as the decision of that point is of considerable importance, though not necessarily of decisive effect in the conclusion of the main question, it will be well to consider and decide it first; but before proceeding to do so, it is desirable to reduce it to as simple a form as possible, and to state clearly the points on which the main question of the ownership of the Aroha lands must be decided. The issues then arising from the nature of the case before the Court, when reduced to their simplest form, may be stated as follows:—1. Did the Ngatihaua claimants and their allies gain the victory at the battle of Taumatawiwi? 2. If so, was the victory a conquest in the sense of enabling the claimants to take the land claimed by them, and did they in fact take, occupy, and possess themselves of the land in question, and hold it as against the Marutuahu? A claim of conquest might be expected to be, and indeed in general is, one of the easiest to decide which can come before the Court. It is where *conflicting claims* between individuals or families of the same tribe

occur, that the greatest difficulties arise, and a very perfect information of the customs and usages on which Maori title is founded, is required by the Court. Conquest is a matter which generally declares itself in a very unmistakeable manner, and in ordinary cases it is seldom long before the Court comes to a conclusion as to whether an alleged conquest has been made or not. The present claim is, however, in many respects exceptional, having its own peculiar difficulties, which have been greatly enhanced by conflicting evidence on many points of importance, by equivocation and falsehood of some witnesses, by every effort to deduce from undeniable facts improper conclusions, and, *not lastly*, the great ability of the legal advocates on either side, and their strenuous and unflagging efforts in the cause of their respective clients The only part of the case to which these remarks do not apply is the history of the battle of Taumatawiwi, and it is remarkable that although both parties claim the victory, and the Ngatihaua in fact claim the land of the Aroha as a consequence of having gained the victory, yet the evidence as to all the incidents of that conflict and its conclusion, is (making allowance for some little colouring and natural prejudice such as was to be expected) very much the same as given by the witnesses on both sides, and the Court is thereby enabled without difficulty to decide the first question proposed, namely, Did the Ngatihaua and their allies gain the victory at the battle of Taumatawiwi? The question is not without importance, and undoubtedly the Ngatihaua claimants attach a great importance to it; it will therefore be well in deciding this question, that the Court point out the reasons by which it has been guided in doing so. This cannot be well done without giving a short account of the battle, its principal incidents and conclusion, as collected from the evidence of both parties. The Marutuahu, being informed that the Waikato tribes had arrived at Te Tiki o te Ihi a Rangi, not far from Haowhenua, marched out early in the morning, nothing daunted, to meet them, and took up a strong position at Taumatawiwi, firing guns as a challenge to come on to the attack. There was small need for the call to arms. At the first gun the Waikatos swarmed forth from their camp, and rapidly formed their order of battle in divisions of tribes, the whole under the command of the celebrated Waharoa; the left was composed of the Ngatihaua, Te Waharoa's own tribe, Ngaiterangi were in the centre, and the Waikato on the right. The left was close to the Waikato river, and Te Waharoa having sent forward a strong body of skirmishers, advanced slowly and in good order to the attack of the enemy's position, the skirmishers in front being already hotly engaged. Soon afterwards, however, a hasty messenger from the front came to Te Waharoa to say that the advanced parties had been almost exterminated and that the few survivors required immediate aid. Te Waharoa then ordered a rapid advance of the whole line, and as the armies closed he called to the tribe or division of the enemy between whom and *the Ngatihaua* a particular rivalry seems to have existed, "O, Ngati-*paoa, I am Te Waharoa*, I fight on the left, by the river of Waikato."

The Marutuahu, well aware of the advantages of their position, awaited the attack, and defended it with great vigour from an early hour in the morning until late in the afternoon, inflicting on the Ngatihaua, who seem to have borne the whole brunt of the battle, a loss probably equal to four times what they suffered themselves. The Ngatihaua notwithstanding, encouraged by the voice of their war chief, and furious more than dismayed at their loss, pressed on and stormed the Marutuahu position, who finding now their ammunition beginning to fail and retreat unavoidable, and after having, for want of lead, fired gravel and stones in their enemies faces at hand to hand distance, unwillingly fell back upon their post of Haowhenua, closely followed by a strong party of the enemy. This retreat was not, however, a rout; the Marutuahu retreated fighting, slaying and being slain, until they arrived at their pa, where, having obtained a fresh supply of powder, they immediately made a sortie, driving back their pursuers as far as a place called Te Reiroa, in sight of, but out of gunshot from, Haowhenua, and where the main body of the Waikato forces were now assembled in their original order of battle, in divisions of tribes. The Marutuahu in returning from this sortie took with them the body of one of their pursuers whom they had killed in the last affray, and claimed thereby the honor of having killed the last as well as the first man in this battle. This fight had lasted from early morning, before either party had partaken of food, till late in the afternoon; and when the sun went down the Marutuahu were secure, though discomfited, in their pa; and the Ngatihaua, the heat and the elation of battle departed, decimated, bleeding, and utterly exhausted, horrified at the loss of many of their best warriors, their chief Te Waharoa wounded, the re-action from over-exertion and physical excitement weighing them down and giving rise to a thousand unwonted apprehensions and alarms, remained the masters of the battle-field, and held in their hands the bodies of the enemy. They had won the battle of Taumatawiwi. This battle took place in the year 1830.

The next question which the Court has to consider and decide is of chief importance, and is as follows:—Was the victory obtained by the Ngatihaua at Taumatawiwi a conquest in the sense of enabling them to take the land claimed by them, and did they in fact take, occupy, and possess themselves of the land in question? A victory is not necessarily a conquest. The party beaten on one day may be more ready for the battle on the next than the enemy by whom they were worsted, and the Ngatihaua themselves declare that the night after the battle of Taumatawiwi was passed by them in great exertions to burn their dead lest they should fall into the hands of the enemy; dry timber for the purpose was scarce and distant, and exhausted as they must have been by the long and desperate contest of the previous day, it does not seem likely they would have undertaken this excessive and unusual labour unless they had at the time *considered themselves in* a very unpromising condition, and not the *victors who had won by* conquest a large tract of land in the enemy's

country, the nearest point of which was twenty-five miles distant, and extending more than ten miles further into the enemy's country, to save from whose hands they were now burning the bodies of their nearest relations and bravest men. It however appears certain from the evidence, and from their own admission, that almost the whole number of their dead were burned by the Ngatihaua for the reasons stated, although the object was not fully accomplished until about the second day after the fight. Inconsistent as this statement by the Ngatihaua may appear at first sight, with the position of having conquered or taken a large tract of land from the Marutuahu, it is not at all so with the admission they make that they did not conquer the tribe of Marutuahu or weaken in any way their military power as compared to their own; nor is it indeed, when closely examined, inconsistent with the assertions that they took the land as a consequence of the battle, as subsequent events arising from the battle might certainly have given the power to do so, and this is in fact what the Ngatihaua affirm to have occurred and claim to have done, and the whole of the evidence which they bring forward, commencing with the events which took place on the morning after the battle, and which goes on to give the history of the two tribes, with their relative position to each other from that time to a recent date, is intended to show that they did actually take and occupy and hold the lands of the Aroha, from immediately after the battle of Taumatawiwi, of their own act and without any cession of the land having been made to them by the Marutuahu tribe, and without any reference to their wishes or consent in the matter. It is necessary, with the view of arriving at a just conclusion, to follow this evidence step by step, to examine it closely, to compare it, not only with facts brought in evidence by the other party, but with itself in its different parts, and also to closely observe the relations which have existed between the two parties from the morning of the battle of Taumatawiwi to the present day. There are, however, some matters proved in evidence or admitted by either party, which must before going any further, be noticed, and some remarks as to their bearing on the case made.

The block of land claimed by the Ngatihaua, and called Te Aroha, is situated at the southern extremity of the Marutuahu estate or territory, and may be about eighty miles south of Cape Colville, which is the northern boundary of the Marutuahu lands; it never was a principal residence of the Marutuahu tribes, though sometimes occupied and resided on at will by families or parties, more or less numerous, of the Marutuahu people, whose principal places of abode, permanent settlements, cultivated lands, forts, and heads of population, were scattered over the Marutuahu country at distances of from thirty, forty, and fifty, to eighty miles from the Aroha block, as was the case when a strong division of the Marutuahu tribe lived at Moehau, Cape Colville, and where they were on one occasion attacked by the Ngapuhi, whom they repulsed with loss. Owing to these circumstances, and to the insecurity attendant in those days on any small number of people living at too great a distance

from their tribe, or in any unprotected situation, the Aroha lands, and particularly that part of them to the West of the Waihou river and nearest to the Waikato country, were often for several years entirely uninhabited, or merely visited at irregular and sometimes long intervals by the Marutuahu owners, and in general only for the purpose of catching eels, for which the ponds, streams, and swamps on the Aroha were famous. The occupation of the Aroha lands by the Marutuahu owners previously to the battle of Taumatawiwi having been of the nature described, they are not, in asserting or establishing a continuity of ownership subsequent to that event, obliged to show any different, more permanent, or positive occupation than on former occasions. It is sufficient for them to show that they could come upon the land at will, cultivate or make other use of it when they chose, and that they prevented the settlement or permanent occupation of the land by others. From the admission made by the Ngatihaua claimants, that neither after the battle of Taumatawiwi nor at any other time was there any cession of land made to them by the Marutuahu; and also in consequence of their declaration that they took the land without the consent, and, therefore, as must be inferred, against the will of the Marutuahu people, it is incumbent on them, the Ngatihaua claimants, on coming in as new owners, to prove that they did enter into practical possession and did occupy the land exclusively, undoubtedly, and permanently, and that they kept off the Marutuahu people especially, and prevented them from exercising any acts on, or making any use of, the land, which might be construed as acts of continued ownership. The Ngatihaua are doubly bound to show that they have fulfilled these conditions, in consequence of admitting that they did not conquer, subjugate, or even weaken the Marutuahu people, which admission leaves them nothing in fact on which to found their claim but occupation, and which should therefore be of the most undoubted, permanent, and exclusive nature to assume the character of ownership, for mere transient intrusion by a few persons unable to hold their position against the Marutuahu, would be but our ordinary trespass, and establish no right. The title of the Ngatihaua depending then on long and unbroken occupation, without any cession having been made to them by the original owners, and without, as they admit, having weakened or depressed the original owners in any way, in their military power, the proof of that occupation should be rigorous and complete, which, if given, would imply a practical, though tacit, acquiescence on the part of the Marutuahu, on which a title of ownership by the Ngatihaua might well be founded in Maori usage and custom. The Ngatihaua bring many witnesses to prove the fact of their occupation of the land for a long series of years, which is absolutely denied by the Marutuahu, who bring an equal amount of evidence in support of their version of the case, and the evidence throughout is of such a contradictory character that it has only been with the *greatest difficulty, and by* facts brought out chiefly by a close cross-

examination of witnesses, by the evidence of a few uninterested persons, and by a close enquiry and examination into the condition of the two tribes and the relations they maintained towards each other, from the battle of Taumatawiwi till a recent period, that the Court has been at last enabled to come to a decision in the matter; but as this case has been so long and pertinaciously contested, and the property adjudicated upon is of very considerable value, it will be well, even though it may be tedious, to show the principal reasons and considerations on which the judgment of the Court is founded, and to do this will involve the quotation and recapitulation of evidence to a considerable length.

Early on the morning after the battle, according to the account given by the Ngatihaua witnesses, the Waikato tribes, after a day of hard fighting and a night spent in burning their dead, were in arms again and on the point of marching to attack the Marutuahu in their fortress of Haowhenua, when a deputation from the Marutuahu appeared, consisting of some eight or ten persons, two of whom were the chiefs Taharoku and Tupua, men of high rank in the Marutuahu tribe. They came in humble guise and unarmed to ask for peace. The Marutuahu version of this affair is considerably different; they positively affirm that the meeting did not take place until the second day after the fight, and not until Taharoku had received an invitation from Te Waharoa, the Ngatihaua chief, to come to him for the purpose of arranging terms of peace or a cessation of hostilities for the time being. This point, as to whether the chief Taharoku and his companions came with or without the invitation of Te Waharoa, is hotly contested between the parties, but it is of little consequence how this meeting was brought about; the matter of importance is that it did really take place, and that an agreement, truce, or convention was made between the parties, by which the Marutuahu agreed to evacuate the Waikato country, including the lands of the Raukawa tribe, which they had taken, and to return to their own district about the Thames. This having been agreed upon, and it having been further stipulated that the Marutuahu should go unmolested, and taking all their property of every description, the Waikato and their allies departed for their different homes, leaving the Marutuahu at Haowhenua, who, according to agreement, in about three months according to their own account, but in about three weeks after the battle by the Ngatihaua version, departed quietly and unmolested to the Thames. Several Ngatihaua witnessess who were present when this agreement was come to between the two chiefs, gave their evidence in Court, and profess to give *verbatim* the speeches of the different Ngatihaua chiefs. One witness says that Te Waharoa, in addressing the Marutuahu chief, said, "If you had beaten me, you would have taken all my land, but as it is you who are beaten, *all my land has returned* to me." This would appear to mean the Horotiu and Maungatautari lands in Waikato, which the Marutuahu had been occupying, and on which the battle had been fought. Other witnesses make Te Waharoa say, "*You must leave my* lands and return to your own country at the

Thames" (of which the Aroha is a part). Another witness represents Te Waharoa as saying, "I will take all the land up to the Aroha;" and only two witnessess state that the Ngatihaua chief signified any intention of taking Aroha, and of these two one afterwards modified his statement by saying that it was not the Aroha but the lands of Horotiu and Maungatautari that Te Waharoa seemed desirous about. This, it must be observed, is the claimants' own story; and Taharoku, the Marutuahu chief, also, according to the claimants' witnesses, like a good Maori diplomatist, having the interest of his tribe in view, said nothing at all, except "How am I to get away." He was also assisted a good deal by his colleague, Te Tuhua, a gruff and burly warrior, related distantly to Te Waharoa himself, who made one of those grim jokes which the Maori fighting men of old were fond of flinging in the very jaws of death. Giving a side glance at a heap of sweltering, smoking, and only half consumed bodies of the best and bravest of the Ngatihaua tribe, he said quietly to Te Waharoa, "Why are you spoiling my provisions?" or words to that effect. The burning of their own dead on the battle-field is a very unusual practice, and never had recourse to by natives, especially near their own country or district, except under very desperate circumstances, when hope is lost of saving the bodies from the enemy's ovens in any other way. The laconic speech of Te Tuhua contained a volume of acuteness, and showed him to be keenly alive to the position of both parties. It was as much to say to Te Waharoa, "You are putting the best face you can on matters, and trying to dictate terms to us, and are nevertheless ready to run yourself at a moment's notice." Taharoku also seems to have been a man of a practical turn of mind, and the only question which seems to have troubled him at all on this very momentous occasion was that which he put to Te Waharoa: "How am I to get away?" After several years fighting, after the last determined struggle for mastery, the contending tribes remained as before, able only to inflict mutual disaster, but without any appearance of one party being able to conquer the other. The Marutuahu, no doubt, were fully as desirous of returning to the Thames (they had just heard that European traders had arrived and were selling guns and powder) as the Waikato tribes were to see them go; yet the difficulty and danger of moving was great, and Taharoku fully understood it. He had to remove not merely an army of light-armed, able-bodied warriors, who could traverse a country with almost the rapidity, and more than the devastation of a hurricane, penetrating forests, swimming rivers, scaling mountains, and subsisting for days on almost nothing; he had to remove a tribe—old men and women, young children, the sick and wounded, and all the property, provisions, and baggage. There was only one plan of retreat open to him: this was by the Waihou and Piako rivers, where all the canoes procurable awaited him; but to arrive at these two points he would have to divide his force into two about equal bodies, who would be obliged to separate, and be thus liable, either party, to be attacked by the whole Waikato force, and, encumbered as they would have been by

women, children, non-combatants, and baggage, cut off in detail. Nor was this all. On arrival at the rivers Piako and Waihou he knew that the number of canoes was quite inadequate to carry the whole tribe, and consequently the two divisions would have to again divide, one-half of each division going in the canoes and the other half, now at each place reduced to a fourth of the whole force, remaining behind until the canoes could be returned, and thus exposed for several days to certain destruction should they be attacked by the concentrated force of the Waikato enemy, who was not likely to throw away such an opportunity. The difficulty was really great, and the military problem, as Taharoku put it in very few words, was one impossible for him unassisted to solve; but Te Waharoa must certainly have been to the full as anxious to get rid of the Marutuahu as they were to return to their district; for when he said to Taharoku, "You must go home to your own country at the Thames," and the astute and politic Taharoku, without wasting a single word, showed that he fully understood his own position, and was not such a fool as to think of returning to the Thames except under such circumstances as would ensure to him a safe and unmolested retreat, by merely saying, "How am I to get away?" Te Waharoa, seeing that there was no chance of entrapping him into a false move, or of getting rid of him in any way except in perfect safety, and with every convenience to himself, solved the difficulty proposed by Taharoku in the most decided and satisfactory manner, and in as few words as it had been put, by simply saying, "You shall be led out." Now the Maori words which are commonly translated as "led out" may be also rendered "guided out," or "escorted out," and they do not, and did not, in the sense in which they were used by Te Waharoa, convey any meaning which would imply humiliation or disgrace to the Marutuahu. What they really did mean, and what rendered them so perfectly satisfactory to the Marutuahu leader, was, that in fact Te Waharoa never meant anything by those words more or less than that when the Marutuahu were ready to go he would send with them two or three persons of consideration of his tribe, who would be in fact hostages or pledges for the safe and unmolested retreat of the Marutuahu, who, it was well understood, would put them to death on the first sign of an attack. Hostages of this kind, whose lives are hanging by a thread, and whose presence constitutes the Maori safe-conduct, are in the Maori politely called "guides" or "leaders." This explanation, though tedious, is not without an object, for it appears that some years afterwards a settler at the Thames, either jokingly or in some little quarrel with some young men of the Marutuahu, added his own gloss to the phrase "led out," and said to them "You were led out like pigs." This not very flattering interpretation was bandied about amongst the Marutuahu, and to show how in the course of events, and in the lapse of time, and from what originally trifling causes, the truth became obscure and falsehood established as truth, this liberal interpretation of the phrase "led out" by a European settler was taken up about the time

of the first hearing of this claim, by Taraia, a ferocious old Marutuahu war-chief, who, as it would appear, for the purpose of exciting his people against the Ngatihaua, and doing in a general way as much mischief as possible, taunted the Marutuahu with having been led *out of* Waikato "like pigs," or at least of having been accused of *being* led out like pigs. This accusation made against the Marutuahu *by* one of their own chiefs, being repeated and a good deal talked about at the time, had the effect, no doubt, of causing it to be believed by Europeans and "outsiders" generally, who had no particular reason for investigating the matter closely, that the Marutuahu had been expelled from Waikato under circumstances of marked defeat and humiliation, and it appears very probable that it is owing to this impression having been observed by the Ngatihaua claimants that a great number of their witnesses in Court have dwelt on the circumstances of the "leading out" of the Marutuahu, and brought it prominently forward as a proof of their having thoroughly defeated that tribe, and being therefore in a position to take, or to be supposed to have taken, the Aroha, or any lands they chose; and it seems likely, also, that the reason of the Marutuahu witnesses unanimously and positively denying the whole affair, and declaring that not one individual of the Ngatihaua tribe accompanied them on their return to the Thames, is that they have fancied, like the Ngatihaua, that if the circumstance of the "leading out" was proved, the Court might not view it in a proper light, and give more weight to it in deciding the main question of the ownership of the Aroha than it really deserved. The Court, however, from the general evidence, and from corroborating evidence, thinks that the Marutuahu very probably were accompanied on their return to the Thames by a chief of the Ngatihaua called Pakerahake and two chief women of the same tribe, but does not consider the circumstance to be at all of the importance in the decision of the question of the ownership of the Aroha lands that both the contending parties thought would have been given to it. Much time has been wasted in attempts to prove or disprove this matter, and though it is not in reality of any decisive consequence in its bearing on the main question at issue, so much has been made of it in Court that it would not have been well to pass it without notice. A secure and unmolested retreat having been thus granted to the Marutuahu, they, after three months of preparation, according to their own account, but in three weeks after the battle, according to the Ngatihaua, evacuated their fort at Haowhenua, and departed by three different routes: by the Waikato, the Waihou, and Piako rivers; and all three parties arrived in due time, and without molestation or misadventure, in their own district.

The Marutuahu having departed, the Ngatihaua came at once into possession of the lands at Horotiu and Maungatautari, which their opponents had occupied for several years, more as combatants struggling for possession than as established owners, and the Ngatihaua were certainly so far gainers by their departure; but the Ngatihaua *claim to have* taken also the Aroha lands, which were part of

the old acknowledged Marutuahu tribal estate, and which were separated by a wide belt of country from the districts evacuated by that tribe, and in which the battle was fought. The Ngatihaua state in evidence that one month after the Marutuahu had gone, a party of Ngatihaua, of whom Te Waharoa was one, proceeded to the Aroha, and took a formal possession, agreeing amongst themselves as to the division of the different eel-ponds, streams, and old eel-weirs, and also in a rough way dividing the land amongst themselves, after which, and having stayed about a week, they returned to Matamata, where they built a pa, and where they have continued to live permanently ever since. It is clear that this merely formal or nominal act of taking possession by the Ngatihaua of the Aroha lands, except followed up by occupation of a permanent nature, could give them no title by Maori usuage, any more than it would by English law. Any man can go on to another man's land during his absence, and say, "This pond, or river, or forest is mine;" or, "This valley shall belong to my cousin;" and the Ngatihaua, as has been shown, are, in consequence of not claiming to have conquered or depressed the Marutuahu, or to have received any gift or cession of land from them, doubly bound to show the most undoubted and unopposed, or, if opposed, successfully defended, occupation or possession. These conditions the Ngatihaua claim to have fulfilled, and bring evidence to that effect. The Marutuahu, on the contrary, declare, and bring evidence to shew:— 1. For twelve years following the battle of Taumatawiwi, they (the Marutuahu) made successful and aggressive war against the Ngatihaua and their allies, attacking them repeatedly, not on the Aroha, where they could never find anyone to oppose them, but chiefly in the heart of their own country, and in their populous settlements. 2. That these attacks were never returned, or attempted to be revenged, except once, after several years, when the Waikato attacked a village on the borders of the Marutuahu country, called Hauarahi, not near the Aroha, and where, after surprising and killing several persons, they were repulsed by the inhabitants of the place, and chased into their own country, from whence they never again returned to make any attempt against the Marutuahu. 3. That the alleged occupation of the Aroha by the Ngatihaua after the battle of Taumatawiwi, is false, and was in reality neither more nor less than a series of furtive trespasses, made for a few days at a time for the purpose of catching eels in the absence of the Marutuahu, who seldom inhabited permanently that part of their estate. 4. That when, after peace was made between the tribes, about twelve or thirteen years after the battle of Taumatawiwi, a few Ngatihaua people are found living for a time unmolested on the land, they were there in consequence of an express permission, granted at their own request by the Marutuahu chief Taraia, who imposed the condition that they should not cut valuable timber, or make any claim of ownership to the land. And 5. That when, in or about the year 1864, or about thirty-four years *after the Ngatihaua* claim to have been in possession, for the first *time the Waikato and* Ngatihaua people are seen on the Aroha in

any considerable numbers, and residing unmolested for one year, they were placed there by certain Marutuahu chiefs, of whom Waraki and Tamaru were the principal persons, and by the expressed consent of the *runanga* or council of the Marutuahu tribe, who allowed them to be on the land for a time in consideration of their distressed circumstances, the Ngatihaua having been driven from their own country in Waikato by the European forces.

The evidence on several material points being, as has been remarked, very contradictory, the Court, in deciding between the conflicting statements, has had to trust chiefly to the evidence of a few apparently uninterested witnesses, such admissions as have been made by either party, chiefly under cross-examination, and such parts of the general evidence as seem trustworthy, and which, at the same time, have any bearing on the question at issue, but which bear but a small proportion to the mass of evidence given in Court, and with these guides we shall now proceed to enquire into the position held by the tribes relatively to each other after the battle of Taumatawiwi, and observe what was the real nature of the occupation of the Aroha lands by the Ngatihaua claimants subsequently to that event. John Cowell, a European trader who travelled through the Waikato country in going from Kawhia to Tauranga in the end of 1830, and shortly after the battle of Taumatawiwi, gives the following description of what he saw and heard amongst the Ngatihaua people in their own country: —"I know Haowhenua (twenty-five miles from nearest point of the Aroha). I was there in the end of 1830. The natives who were with me were very careful how they lit fires, lest they should be discovered by the Thames natives (Marutuahu), whom they were greatly afraid of; we got safe to Tauranga. I returned to Kawhia in January 1831, by way of Matamata and Kamehitiki (four hours journey to nearest point of the Aroha). The Ngatihaua were there in great numbers. At Matamata, at the pa, they were working at flax and cultivating, but appeared in continual expectation of being attacked; they did not seem to wish for fighting. I saw the Ngatihaua pa at Kamehitiki; they were also in fear of Hauraki (Marutuahu). They expected the enemy by two roads, one by the Waihou and the other by the Piako. In the end of the year 1831 I returned again from Kawhia to Tauranga. I called on my way at the same places, Matamata and Kamehitiki; I found the people in the same state and under arms. I heard that during my absence they had been attacked by the Thames natives, and that they could not tell what moment they might be attacked again. They were in fear of the Hauraki natives, and as far as I could judge, they had no desire to attack them. Every night they slept in the pa. The Thames natives, in the year 1832, attacked the Ngatihaua at Waiharakeke. I heard this from the Ngatihaua at Matamata." In answer to a question by claimants' agent, he says, "I found the natives at Matamata and Kamehitiki, as well as my guides, to be greatly in fear of the Thames natives." Again he says, "On my second return to Matamata I heard the Thames natives had been there, but had not succeeded in taking

the pa." In answer to a question of counsel for Marutuahu, "I know the Ngatihaua kept in their pa when attacked by the Hauraki natives; they never came out." This description by an uninterested witness of the state of things existing amongst the Ngatihaua, not on the Aroha, but in the most populous and fortified part of their own country, twice attacked within a short time after the battle of Taumatawiwi, on one of which occasions they kept within their fort, not daring to come out to fight the invaders who beseiged them for some time, and on the other (at Waiharakeke) driven off their own land, in the neighborhood of Te Aroha, without the ability to make even a pretence of resistance (as their own witnesses acknowledge), is not the picture one would expect of the Ngatihaua people, who declare that at this same time they held a large and valuable district of the country of that enemy, whom they dreaded so much as to be afraid to light a fire in travelling in their own country, lest the smoke should betray them into his hands.

We will now make some extracts from the evidence of Albert John Nicholas, another European settler and trader, and as the witness Cowell gives a description of the position of the Ngatihaua in relation to the Marutuahu tribe at about a year or eighteen months after the battle of Taumatawiwi, so Nicholas tells what he observed in 1846 or 1847, when he first came to live at Waiharakeke, close to the Aroha block, and sixteen years after the Ngatihaua claim to have been in possession. He remained there some eight years, and thus had full opportunity for observing who were the actual occupants of the Aroha block, down to a period of about twenty-four years from the date at which the Ngatihaua allege they took possession. After this time Nicholas left, and went to reside at the Thames, but in the course of his business re-visited the neighbourhood of Te Aroha to as late a date as 1863 or 1864, thus continuing his observation of the state of the occupation of that place, and the position of the two tribes respecting it, to about thirty-three years after the Ngatihaua claim to have taken and occupied the land. This witness, also, from being long and intimately acquainted with all the principal men of both the Marutuahu and Ngatihaua tribes, has had opportunities of gaining information on the matter of the ownership and occupation of the Aroha land, such as few but himself possessed. The river Waihou runs completely through the Aroha block, and of his first voyage down that river after having come to reside at Waiharakeke, on the borders of the Aroha, and on other matters, Nicholas says, "I was the first who brought produce down that river. I first went down about 1847 (seventeen years after Taumatawiwi). The Ngatihaua people cautioned me not to let my 'boys' (*i.e.* his crew of Ngatihaua young men) steal the pigs belonging to the Ngatimaru which were running on the banks of the Waihou river, running through the Aroha. On this voyage I saw a cultivation on the south-west bank of the river *belonging to Ngatimaru* (Marutuahu). I often saw Ngatimaru catch*ing pigs at Matauraura* (on the Aroha). The first crew I had with

me going down the river were Ngatihaua men; the Ngatihaua people were fearful lest they should be molested by the Ngatimaru. I promised that if anything serious befel them, they might take all the goods in my store. Previous to my taking goods down the river the Ngatihaua did not take their produce that way; they were obliged to go overland or by the Piako from fear of the Ngatimaru. I know it would have been a great benefit to the Ngatihaua to have had the Waihou open to them. Thompson, the principal Ngatihaua chief, and all the other old chiefs told the people who went with me to respect the lands of Marutuahu, that is from Waiharakeke to the other boundary of the Ngatitamatera hapu (the whole width of the Aroha block). Thompson wished to be on good terms with the Ngatimaru, so that the river Waihou might be opened to him for traffic." Speaking of a date long subsequent to this, this witness says, "Thompson said to me he should like me to go to Mauawaru (on the Aroha) to live, if the Ngatimaru could be got to give their consent. I told him they would allow me to live anywhere I chose, but I did not care to go there. I am aware that at one time there were some Ngatihaua on the Aroha; they were there by permission of the Ngatimaru (Marutuahu). I heard both the Ngatimaru and themselves say this. A Ngatihaua man named Te Iwi offered to sell me a canoe; he was with others on the Aroha making canoes; they were not living there permanently, but only for the purpose of making the canoes. I asked Te Iwi how he came to be there making canoes: he told me he and his companions had permission from Taraia (a Marutuahu chief), but that they would have to pay him dearly for that permission. This was in or about 1863, or before the Waikato war (33 years after the Ngatihaua state they first entered into possession). During all the time I was living at Waiharakeke (from 1846 to about 1854), there was no one living on the Aroha except Wahataupoki, a Marutuahu; afterwards Parakauere came there with others, all of them Ngatimaru (Marutuahu) people. The Ngatimaru were very particular in looking after their pigs which were running on the Aroha, and often went to look after them, which was the cause of the fear of the Ngatihaua crew who went down the Waihou with me in 1847. I had heard that peace had been made before that time, but the Ngatihaua did not seem to believe in it."

The witness Cowell shows us the Ngatihaua down to a year and a half after the battle of Taumatawiwi on the defensive in their own territory, and this witness describes the Ngatihaua fourteen years afterwards as afraid to pass through the Aroha, even though merely in the character of his hired boatmen, while at the same time the Marutuahu were making a profitable use of the land by running pigs upon it, which they attended to with care; he also says that for the eight years he lived at Waiharakeke no one lived on the Aroha except some Marutuahu people. He then tells of some Ngatihaua whom he finds making canoes on the Aroha, thirty three years after being, as they say, in full possession, and who acknowledged that they should have *to pay dearly to a Marutuahu* chief for his permitting them to come

there. The Ngatihaua do not contradict this statement about the canoe making; they only say they know nothing about it, and altogether the evidence of both Cowell and Nicholas does not give the idea of their being in the position of conquerors who have been in occupation about forty years. Their own evidence as to their occupation of the Aroha, will, after some short quotations from the evidence of another European witness, be reviewed, when it will be seen whether they can rebut or explain those parts of the evidence of Cowell and Nicholas, which certainly appear to make very strongly against them. James Farrow, being examined, says:—"Some six months after Taumatawiwi, the Ngatihaua were getting flax at Waiharakeke; I heard of Taraia afterwards killing some of them and driving them off. It would not have been safe for the Ngatihaua to take their produce down the Waihou. It takes three or four hours journey to go on foot to Waiharakeke from Matamata." It appears from this that as it only took about four hours to come from Matamata to Waiharakeke, and as the distance is about the same from Matamata to the nearest point of the Aroha, where the eel-ponds are, Ngatihaua would have many opportunities of trespassing on the Aroha lands, catching eels or killing pigs, without the Marutuahu, who were in general absent at from thirty to forty miles distant, knowing anything of the matter. In fact, the Ngatihaua themselves acknowledge, as will be seen, that they both could and did do these things often without the Marutuahu knowing anything about it. One of the Ngatihaua witnesses, in speaking of a Marutuahu man who, from being related to some of the Ngatihaua, used to go frequently to visit his relations at Matamata, being asked whether this man ever, in passing through the Aroha on his way to Matamata, saw the Ngatihaua catching eels, answers, "No, the visitor would travel in fine weather, but the eels could only be caught during floods." Under these circumstances, it would be surprising indeed if the Ngatihaua did not trespass on the Aroha for the purpose of catching the much-coveted eels, and killing a few pigs now and then; nor is it to be wondered at that these acts, now that the Aroha estate has, from various causes, increased so much in value, should have been erected into proofs of occupation and ownership. Whatever other or more weighty arguments the Ngatihaua have to bring in support of their title shall be presently considered.

We shall now quote from the evidence of Te Raihi, a principal chief of the Ngatihaua, and principal claimant in this case, and also from the evidence of several other Ngatihaua witnesses, to see by their own shewing and admission what the occupation and cultivation of the Aroha by them really was—a matter of chief importance in substantiating their claim, or rather, indeed, the only ground they have, as they admit they did not conquer the Marutuahu owners, and that no cession of the land was made to them, and that they simply *took it and kept it.* It has been noticed by the Court that the Ngatihaua *have continually* spoken of "cultivation" on the Aroha, but *have seldom made* use of the term "occupation." There certainly

can be no better example of the occupation of land than its cultivation, and the Court has therefore enquired closely into what this cultivation and occupation really was, and on this subject Te Raihi gives the following evidence :—"It is because I have lived on the land and cultivated since the battle of Taumatawiwi that I say the Aroha belongs to me. We have been in possession ever since the time of Haowhenua (41 years) and are now living on it." Speaking of having been attacked at Waiharakeke, near the Aroha, in 1831, and a year after the battle of Taumatawiwi, this witness says, "We had no cultivations on the Aroha at this time, because it was a time of fighting. Maungatautari and Matamata were our great places of residence" (one of these places is twenty-five miles distant from the nearest point of the Aroha, and the other four hours' journey distant). "We might have taken eels or made small cultivations for weeks without the Marutuahu knowing anything about it. I cultivated at the Aroha, at Maungaauhenga two weeks, and then went away to Matamata. The cultivation was merely a few potatoes, so as to have something to eat when we came back to catch eels. We returned next year to Te Kuapa stream and caught eels, but did not cultivate. When we used to go to Te Aroha about this time we did not put up good houses; we put up sheds to sleep under. We were afraid the Marutuahu might attack us: that was the reason we did not permanently reside there. I did not see Marutuahu living on the Aroha after the battle of Taumatawiwi. I cannot say positively they were not there. We never built a pa or fortification on the Aroha. After the battle of Taumatawiwi, and before peace was made (twelve or thirteen years), there was no safety in travelling about the country." This witness also admits that the Marutuahu attacked his tribe four times in their own country: at Waiharakeke, at Matamata, at Kamehetiki, and Te Hira and their allies at Ongare, and that they were never worsted, or pursued, or even attacked, in returning to the Thames from the Waikato country. The admissions made by Te Raihi seem very inconsistent with the position he claims for himself and tribe—that of owners who have been in possession and occupation of the land for forty years. We find, in fact, by his own evidence and admission, that the residence of himself and tribe was not at the Aroha at all, but at Maungatautari and Matamata, in the Waikato district; that the only example of cultivation he gives, and of which he seems to know anything positive or personally, was during a hasty visit to catch eels, when the Marutuahu were known to be absent, when he and his companions planted a few potatoes, which occupied them, by his own account, only two weeks (one of his companions says four days), and that having done this they went away with their eels to Matamata, and did not come back for a year, and then only to catch some more eels at a different place, and no cultivation or permanent residence was attempted. He also says that the Ngatihaua "were never molested by the Ngatimaru, except when the Ngatimaru were *fighting with them,*" which is the same thing as to say they were

never molested except when they were molested. He also says "The occupation of the Aroha was 'off and on' when there was no fighting;" but as the Marutuahu attacked the Ngatihaua whenever they thought proper for many years after the battle of Taumatawiwi, the "off" appears to have been the rule, and the "on" the exception. It does not appear that the Marutuahu ever attacked the Ngatihaua on the Aroha itself, though they used to go through it on their war expeditions into the country of the Ngatihaua, but it will be clearly seen by the evidence of the following witnesses, who, although claimants, and making out the best case they can for themselves, acknowledge that the reason why the Ngatihaua were never attacked on the Aroha was that, in fact, the Ngatimaru could not find them there, and that any straggling eel-catchers or pig-stealers who might have been on the land always fled with precipitation on the first news of the Marutuahu approach. It is remarkable that through the whole forty years during which the Ngatihaua claim to have held the Aroha, and through the whole course of their evidence, there is not one single instance of their being on the land, for however short a time, as a tribe, or in such force as would give them the most remote chance of holding it against the Marutuahu, who made open war against them for at least the first ten years during which they (the Ngatihaua) pretend to have been in occupation, and during which ten years not one shot was fired nor one blow struck on the Aroha, simply because the Marutuahu could never find anyone there to fight with. Some of the Ngatihaua witnesses, it will be seen, very candidly acknowledged that if they had been there the Marutuahu would have killed them. Heta Tauranga, a witness for the Ngatihaua claimants, and evidently a strong partisan, states that being employed by Nicholas, a European trader, he went through the Aroha by the river Waihou in the year 1847; and at that time, being seventeen years after the Ngatihaua state they came into occupation, there was no one on the land. Hakeriwhi Purewha, a Ngatihaua witness, says, "I was one of the party who went to take possession of the Aroha. We went a month after the Marutuahu had gone back to Hauraki. We went back again the same year and caught eels and planted potatoes. When the potatoes were planted they were left there. The people returned to Matamata for the most part in four days; some remained about a month, and then returned to Matamata. We went backwards and forwards in this way until we were attacked at Waiharakeke. There were always some Ngatihaua going on in this way till we were attacked at Waiharakeke, (two years after Taumatawiwi). "I never saw any Marutuahu on the Aroha at any time when I was going to and fro between Matamata and Aroha. I should have seen them if I had stayed five or six days longer when Waiharakeke was attacked. I should also have seen Marutuahu when they came with their allies to attack Matamata, but we heard they were *coming* and went away, otherwise they would have killed us. *Waharoa said,* about the people killed at Waiharakeke, that the *Marutuahu might* kill the people, but that he would have the land.'

Question by Court: Do you think that idea of Waharoa's could be carried out successfully? Answer: "I cannot say that it could. After the Waikato war (about 1864 or 1865) Waraki (a Marutuahu chief) brought about 200 Waikato people on to the Aroha; they did not take him there, it was he who took them there: they were relations of his wife, a Waikato woman. He (Waraki) afterwards took them away to Hikutaia, in the Thames." This witness, although like the other claimants, making a general claim on the ground of old-established occupation, makes admissions which are entirely inconsistent with the idea that the Ngatihaua held possession of the Aroha, and shows their occupation to have been in fact a dangerous game of hide and seek, played by a few individuals with the Marutuahu, and at the risk of their lives, for the sake of getting more eels, now and then, and when the Marutuahu were absent. The Quaker principle said to have been adopted by Te Waharoa, the great Ngatihaua war-chief, of letting the people be killed without retaliation and keeping the land nevertheless, cannot be accepted by the Court as "Maori usage and custom," or practicable in any point of view, or in any way likely to help the cause of the claimants; and indeed, the witness seems, after all, to have thought the non-combatant position of the Ngatihaua did not look creditable, and so he gives another reason for it, which is that Thompson, the Ngatihaua chief, had become a Christian, and would not allow or authorize war on any account. This no doubt may have been a very good thing for Thompson to do, but it does not appear likely to have been any help in ousting the aggressive and implacable Marutuahu from the Aroha. Piripi Te Matewha says: "I don't know when we first went to the Aroha. We began to cultivate there two years after the battle of Taumatawiwi, merely a few potatoes to eat when we came to get eels, about two or three baskets in a place. When I went to cultivate, I stayed from three days to a week. We cultivated in this small way for two years, going backward and forward. I never saw any Marutuahu on the land. I was at Matamata when it was attacked; there were no Ngatihaua on the Aroha then. We heard Marutuahu were coming, and left. I heard of Marutuahu people cultivating at Manawaru, on the Aroha. Waharoa did not attack them. We were at Matamata when Marutuahu came to cultivate Manawaru, on the Aroha. We never built a pa or fortified ourselves on the Aroha." This witness, like others, gives us an account of two years' "hide and seek" occupation. He "cultivated" from three days to a week in a year, and with his companions ran away when they heard Marutuahu were coming, which accounts very well for his "not seeing" any Marutuahu on the Aroha. He admits that he did hear at one time of Marutuahu people having come to live and cultivate on the Aroha; he did not "see" them either, for by a remarkable coincidence he happened at that time to be living at Matamata, in the Waikato country. He says, however, that the Ngatihaua cultivated very extensively on Waiharakeke, a place of their own, not on the Aroha, but near it, and lived there until driven off by the Marutuahu, but

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that the Marutuahu living on the Aroha were not attacked by the Ngatihaua or molested in any way. It is hard to discover the course of reasoning by which this evidence can be supposed to support a claim of ownership founded on occupation and actual possession. The description given by the witness of the few individuals of Ngatihaua going on to the Aroha, as far as his experience goes, is exactly a representation of a few stealthy, timid trespassers, who immediately disappear when they hear the landlords are coming, and never return on another poaching expedition until sure that they are gone. Waata Tahi, a Ngatihaua witness, says; "I was on the Aroha three years, backward and forward. When I used to go, there were about forty people of Ngatihaua in different places, We had no pa. I know nothing of the Aroha after the attack on Waiharakeke." In answer to a question by the Court: "It is necessary that conquerors or people taking land should hold it against the conquered or dispossessed party. We did not hold the Aroha against the Ngatimaru when they came to attack us at various times. The Marutuahu often came back to attack us." Here we see again a Ngatihaua claimant, whose claim is founded on forty years' occupation, when closely questioned, admitting that he knows nothing at all of the matter except a little "off and on" eel catching, and a few days' potatoe planting, which ended about thirty-eight years ago, and which at the time was evidently done in fear, and by stealth. He also acknowledges the necessity of persons professing to have taken land from others, to practically hold it and defend it against the persons dispossessed, and says at the same time that the Ngatihaua did not fulfil these conditions with respect to the Aroha. It would almost appear that this witness came into Court for the purpose of overthrowing the claim he was ostensibly there to support. Karehaua, a Ngatihaua, says: "I first went to the Aroha after the Marutuahu had returned from attacking Matamata. We went to catch eels and made some small cultivations, and then went away to Matamata. I was three years at Manawaru and three at Mangaemiemi, on the Aroha. I did not live all the time at Manawaru. I would be absent a year at a time from that place; I would be back there from Matamata twice in a year. When I lived at Mangaemiemi I used to go to Matamata, which was my chief place of residence. When we caught eels we in general took them to Matamata." Questioned by Court: "The land is better at Aroha than at Matamata, and the place more convenient for trade." Questioned by the Court as to why they did not settle there? He replied: "It was a thought of the Ngatihaua not to live on the Aroha. Kaipohue, a Ngatihaua, destroyed a small plot of potatoes (quarter-acre) which had been planted by Waraki, a Marutuahu, on the Aroha." He says: "I was not on the Aroha when this was done. Who would go there when attacks had been made on us at Waiharakeke and the Uira? Kaipohue pulled up the potatoes secretly, and without *Thompson's* knowledge, and then went away with his companions to *Matamata.*" Question by Court: "Why did you not prevent Marutuahu

from planting these potatoes?" Answer: "Why should we do so? Better to let the Maratuahu go away and then destroy them. I did kill pigs on the Aroha. The Marutuahu did not see me kill their pigs; if they had been there I should not have done so. I saw a peach tree which had been planted on the Aroha by Marutuahu people. I cut it down because I did not choose that anyone should plant peaches on my land." In answer to Court: "I should not have cut the peach tree down if Marutuahu had been there; it would have caused a disturbance. Thompson's servants cultivated wheat on Waiharakeke in 1864." (Waiharakeke, it is to be remembered, is not on the Aroha.) "I was cultivating wheat at Waiharakeke for six years, from 1857 to 1863. It was Waraki (a Marutuahu chief) who brought the Waikato people on to the Aroha after the Waikato war."

This witness comes to prove the right of the Ngatihaua by occupation. He declares he lived and cultivated at two different places on the Aroha, in each place three years. What he calls residence and cultivation turns out to be this—that out of the three years that he was living and cultivating Manawaru he would be absent a year at a time, and when not absent he would be back there from Matamata, twice in one year! This is his own admission on being cross-questioned. As for the three years' residence at Mangaemiemi, seeing what his occupation of Manawaru was, where he claimed to have resided three years, we need not enquire much about the other place after admitting that his principal residence was not there, at Mangaemiemi, during the three years he resided there, but at Matamata, where his principal cultivations were. But this witness also strengthens his position as an owner and occupier by saying that he killed some pigs belonging to the Marutuahu, which were running on the land (Marutuahu call this stealing pigs), and also did a petty act of mischief by cutting down a peach tree which had been planted by some Marutuahu people, but he soon after lowers very much the prestige which he hoped to obtain by these high-handed acts of ownership and authority by allowing, when questioned, that he would not have ventured on the demonstration in the presence of the Marutuahu, as it would have created a disturbance. As to the cultivation of wheat for six years at Waiharakeke, this would, if done on the Aroha, have looked something like a real occupation, but the place is not on the Aroha block, though close to it, and has never been claimed by the Marutuahu as a tribe, though one Marutuahu chief, Taraia, appears to have had an interest in it, and which he asserted very vigorously in 1832 by driving off the Ngatihaua from that place, killing two of them, and taking one prisoner. It also appeared, from evidence which seems quite trustworthy, that the cultivation of wheat mentioned by the witness between 1857 and 1863 was not undertaken until permission to do so had been asked by the Ngatihaua chief, Thompson, and granted by this same Taraia, who in 1832 had driven the Ngatihaua off. This witness also admits that when, after the Waikato war, a con-

siderable number of the Waikato people and some of the Ngatihaua came to live on the Aroha, they were brought there by Waraki, a Ngatimaru chief, who removed them afterwards to the Thames after a year's residence.

Pero Tio, a Ngatihaua witness, amongst other admissions, says, "When I went to cultivate at Kaipara, on the Aroha, myself and three others, all the cultivation we did was to plant one basket of potatoes. The subsequent cultivations were of the same description. We never had any cultivation of consequence. Our houses were such as other travellers make, mere temporary sheds. I went first to the Aroha after peace had been made. We used after to go to the Aroha to catch pigs." The admission made by the Ngatihaua witnesses are quite inconsistent with the position they claim to hold with respect to the Aroha lands; indeed, they from the beginning have been under the difficulty of claiming to have taken the land from a people whom they acknowledge they did not conquer, and who made no cession of the land to them.

On the other hand, the Court, on examining the evidence brought up by the Marutuahu, finds that it must either reject much of that evidence as false, without any just reason for so doing, or must conclude that the Marutuahu have proved the following facts:

1. That although they, the Marutuahu, evacuated the Horotiu and Maungatautari lands after the battle of Taumatawiwi, and returned to their own proper district, of which the Aroha is a part, they never did relinquish their claim to, or relax their hold on, the Aroha block.

2. That for twelve years following the battle of Taumatawiwi they made active and successful war against the Ngatihaua tribe and their allies, not on the Aroha lands, where no one was found to oppose them, but in the country of the Ngatihaua themselves.

3. That by this aggressive warfare they prevented and rendered it impossible for the Ngatihaua to occupy the Aroha lands permanently, or in any way that would give or indicate title or ownership according to Maori usage.

4. That during the twelve years of hostility following the battle of Taumatawiwi, the only persons found living in anything like a permanent manner on the Aroha lands were some seven or eight men and their families of whom the chief Parakawere was the principal person, and that all these men, though some of them were related to Ngatihaua families, by marriage or otherwise, were Marutuahu warriors, who most of them fought against the Ngatihaua at Taumatawiwi and the following battles, and that this chief, Parakawere, instead of being a Ngatihaua, and holding the Aroha, as was attempted to be insinuated, as *locum tenens* for the Ngatihaua, particularly distinguished himself in fighting against them, the Ngatihaua having murdered his wife and eaten her at the time of *the mas*sacre of the chief Takorua and his people.

5. *That those* parties or individuals of the Waikato or Ngatihaua *tribes who, since* peace was made between those tribes and the

Marutuahu, have been living for a time unmolested on the Aroha lands, were there by permission of the Marutuahu people, but who did not concede to them any right of ownership.

6. That the Marutuahu tribes have, since the battle of Taumatawiwi—both during the twelve years of war following the battle, and since peace was concluded with the Ngatihaua—made use of the Aroha lands at will, and in a profitable manner, both by cultivating the land and running stock, and as fully and frequently, it would appear, as they chose to do.

The evidence on which these conclusions are founded is positive and direct, and has not been shaken or weakened in cross-examination. The Court, therefore, taking into consideration also the admissions made by the Ngatihaua witnesses, which go very far indeed to strengthen and corroborate the evidence of their opponents, and seeing that the whole of the evidence as to the Marutuahu side must be discredited without reason, or that the points maintained must be taken to be proved, is unanimously of opinion that the Ngatihaua claimants have failed to prove their title to the Aroha block, and that the Marutuahu tribe have a right to the certificate of title which they claim.

It is therefore ordered that a certificate of the title of the Marutuahu tribes to the lands of the Aroha block shall be issued to the Governor if in years a survey plan, certified by the Inspector of Surveys, shall be delivered to the Chief Judge of the Native Land Court.

Te Wharenui claims to be individually interested in a large portion of the Aroha block. He grounds his claims on descent from Ngatihue, the original owners of the Aroha, and on occupation. It has, however, been proved in evidence that the Ngatihue were conquered and dispossessed by the Marutuahu, under Te Poporo, Te Pukeke, and others, and, moreover, Te Wharenui is only distantly connected with that tribe, and that his ancestress, Te Kura, from whom he claims, left the district five generations ago, married into a strange tribe, and never came back. Te Wharenui appears to have lived for a short time on the Aroha of late years, but merely as the guest of Parakawere.

The Court considers that he has no claim.

NATIVE LAND COURT.

MANAWATU, 4th March, 1873.

JOHN ROGAN, ESQ., *Judge;* T. H. SMITH, ESQ., *Judge;* HEMI TAUTARI, *Assessor.*

KUKUTAUAKI.

THIS is a claim of Akapita Te Tewe and others, representing certain portions of the Ngatiraukawa tribe, to a block of land lying between Manawatu river on the North and the Kukutauaki stream on the South, on the West coast of the Province of Wellington, and extending inland from the sea coast to the watershed of the Tararua range of mountains.

These boundaries include lands the titles to which have been investigated and decided by this Court, which lands are therefore excepted from the present inquiry.

The claimants apply to the Court to order certificates of title in favor of individuals and of sections of the Ngatiraukawa tribe, asserting an exclusive ownership, founded on conquest and on continuous occupation from a period anterior to the Treaty of Waitangi.

The claim is opposed by Te Kepa Rangihiwinui and others, representing five tribes—Muaupoko, Rangitane, Ngatiapa, Whanganui and Ngati Kahungunu, who contend that Ngatiraukawa had acquired no rights of ownership over the said block, and that the land belongs to them as inherited from their ancestors and as still retained in their own possession.

The claimants and counter claimants, with their witnesses, have been heard by the Court on the general tribal question, and

The Court finds: That sections of the Ngatiraukawa tribe have acquired rights over the said block, which, according to Maori custom and usage, constitute them owners thereof (with certain exceptions) together with Ngatitoa and Ngatiawa, whose joint interest therein is admitted by the claimants.

That such rights were not acquired by conquest, but by occupation, with the acquiescence of the original owners

That such rights had been completely established in the year 1840, at which date sections of Ngatiraukawa were in undisputed possession of the said block of land, excepting only two portions thereof, viz.:

1. A portion of the block, the boundaries whereof are not yet defined, situate at Horowhenua, claimed by the Muaupoko tribe, of *which they appear to* have retained possession from the time of their *ancestors, and which* they continue to occupy.

2. A portion of the block at Tuwhakatupua, on the Manawatu river (boundary not defined), claimed by a section of the Rangitane tribe, whose interest therein is admitted by the claimants; and

The Court finds: That the Ngatiapa, Whanganui and Ngatikahungunu tribes have no separate tribal rights as owners of any portion of the said block, nor any interest therein beyond such as may arise from connection with the Muaupoko resident at Horowhenua.

That the Rangitane, as a tribe, have no rights as owners of any portion of the said block, nor any interest therein beyond such as may arise from connection with Muaupoko resident at Horowhenua, or with that section of Rangitane whose claims at Tuwhakatupua are admitted by the claimants.

NATIVE LAND COURT.

FOXTON, MANAWATU, April 5th, 1873.

JOHN ROGAN, ESQ., *Judge;* T. H. SMITH, ESQ., *Judge;*
HEMI TAUTARI, *Assessor.*

HOROWHENUA.

THIS is an application made by Ngatiraukawa claimants for a certificate of title to that portion of the Manawatu Kukutauaki Block, which was excepted from the previous order of the lease made in their favour, excluding only the portion admitted to belong to the Muaupoko tribe

The application is opposed by the Muaupoko, who claim the whole of the excepted portion as owned by their ancestors, and still owned and occupied by them.

The claimants have brought forward evidence, and have sought to prove such an occupation of the land, the subject of inquiry, as would amount to a dispossession of the Muaupoko.

We are unanimously of opinion that the claimants have failed to make out their case, and the judgment of the Court is accordingly in favor of the counter claimants.

The claimants appear to rely principally on the residence of Te Whatanui at Horowhenua, and there can be no doubt that at the time when the chief took up his abode there, the Muaupoko were glad to avail themselves of the protection of a powerful Ngatiraukawa chief against Te Rauparaha, whose enmity they had incurred.

It would appear that Te Whatanui took the Muaupoko under his protection, and that he was looked up to as their chief, but it does not appear that the surrender of their land by the Muaupoko was ever stipulated for as the price of that protection, or that it followed as a consequence of the relations which subsisted between that tribe and Te Whatanui.

We find that the Muaupoko was in possession of the land at Horowhenua when Te Whatanui went there, that they still occupy these lands, and that they have never been dispossessed of them.

We find, further, that Te Whatanui acquired by gift from Muaupoko a portion of land at Raumatangi, and we consider that this claim at Horowhenua will be fairly and substantially recognized by *marking off* a block of 100 acres at that place, for which a certificate *of title may be* ordered in favour of his representatives.

NATIVE LAND COURT.

MAKETU, June 19th, 1878.

THEOPHILUS HEALE, ESQ., *Judge;* HONE PEETI, *Assessor.*

OTAMARAKAU.

IT has been made clear to the Court, on fully weighing the lengthy evidence taken, that from ancient times this land was occupied by Waitaha, and that they became connected by intermarriage with different parties of Ngatiawa, who, under Maruahaira, Rangihouhiri, and probably others, migrated from the East. They also kept up a close connection with the Ngaoho, since called the Arawa tribes, through the Ngatipikiao, who lived immediately inland at Rotoehu and Rotorua.

After the Ngapuhi invasion, nearly the whole of the Arawa tribes came into deadly warfare with the main body of the descendants of the Ngatiawa intruders, who, under the general name of Ngatirangihouhiri, had long held the "mana" over their ancestral lands about Maketu.

In the troubled times which followed the introduction of fire-arms, the whole associated Arawa tribes, including Waitaha, were engaged in scraping flax to procure from the white traders the means of defending their lives. All old occupations of lands were disturbed, and each hapu settled temporarily on the most convenient spot for the work on which they were engaged, and especially on the banks of the Pongakawa river.

As soon as the conquest from the Ngatirangihouhiri was completed by the taking of Te Tumu and the occupation of Maketu, a division was made of the lands which had lain long without inhabitants, like those round Maketu, and the hapus generally re-occupied the places where their ancestors had lived. The Waitaha hapus, and they only, returned to Otamarakau.

They could not have done so except as a result of the conquest made by the whole tribe, and the occupation of particular pieces must have been by the common consent. But Maori custom as well as European law, requires that when indivdual rights have been recognised by the community they should for ever be held secure; therefore, since the conquering Arawa tribes respected the ancestral rights of the Waitaha hapu to this land, to the Waitaha it must be held to belong, and it only remains to ascertain whether names can be selected from the different hapus descended from Waitaha to be declared owners of the whole block, or whether it will be necessary for the Court to investigate the several claims of the different ha to particular pieces within it.

NATIVE LAND COURT.

MAKETU, 1st August, 1878.

THEOPHILUS HEALE, ESQ., *Judge;* and HONE PEETI, *Assessor.*

PAENGAROA.

THE map of this claim includes almost the whole of the great plain which stretches inland from Maketu, between the Kaituna and Kaikokopu rivers, also a comparatively narrow strip of land on the low hills beyond Pakotore, extending nearly to Te Hiapo. Two other claims have been surveyed within it for different claimants—Papanui and Pukaingataru.

All three claims were advertised for hearing before the Native Land Court at Tauranga in 1870, but the Pukaingataru claim only was fully heard. A judgment was pronounced upon it in favour of the Tapuika tribe, who appeared as opponents to the Ngatiwhakaue claimants on that occasion; but, as no order for certificate was made, or other final action taken by the Court, this judgment has now no effect, and the whole block might have been held to be included in the claim before the Court, and the judgment now given might have embraced all the land included in the survey, as the whole is affected by the same rights. But since the native claimants may well have supposed that Pukaingataru was not now in question, the Court considers that it will be more fair to the parties to exclude it from the present judgment, and to leave the title to it to be settled before a future Court, on any claim to it which may hereafter be sent in.

A small portion of the Rau-o-te-huia claim is also included within the boundaries shown on the map, and possibly a very small part of the Waipumuka may be; but the survey must be adjusted, and any portion of those claims, as shown in their respective surveys, is to be excluded from this, and exempted from any effect of this judgment, as well as Pukaingataru.

A considerable number of separate claims have been set up to the whole or to parts of the land under adjudication, but they all resolve themselves into three cases, namely—

1. That of the claimants, who are of the Tapuika tribe, and claim descent from Tia, one of the ancestors who, as very consistent traditions show, came originally from Hawaiki in the Arawa canoe. They depend almost entirely on their ancestral title and on continued possession, which they assert commenced from Tia and has never been completely interrupted for any considerable period.

2. That of the descendants of Tamatekapua and of Rangitihi, including a great number of the tribes which of late years have

commonly been grouped together under the misleading name of "Te Arawa." These maintain that in the beginning this land was allotted to Tamatekapua, another of the Arawa immigrants, and not to Tia, whose lands lay further West; that the southern part of the block, which has been mentioned as being on the undulating country, has always remained, even to the present times, in the hands of some of the descendants of Rangitihi, and that the northern and larger part was always more or less successfully disputed by them with the Ngatiawa invaders.

3. That of the whole of the associated Arawa tribes, who assert that the Maketu lands were fully conquered and occupied for many generations by the various parties of the Ngatiawa, who at different times migrated from the eastward, and who are generally known by the name of "Ngatirangihouhiri," and more recently by the abbreviated name of "Ngaiterangi." These insist that the land was re-conquered by main force, and that therefore it belongs to the conquerors only.

Evidence has been given at vast length before the Court. Every witness, after a lengthened statement, has been cross-questioned, with wearisome iteration, by each of the opposing claimants, often on mythical and palpably fabulous stories of their remote ancestors; still more often, on the details of battles, way-layings, and slaughterings, minutely told off as payments for each other, but which could only throw light upon the case in so far as they afforded means of estimating the ultimate results of those protracted contests.

From all this immense and confused mass of traditions, the following salient facts have come out with a clearness which leaves their truth beyond reasonable doubt.

It has been shown that for about five generations after the arrival of the Arawa canoe, the descendants of Tamatekapua, and probably also those of Tia, lived on the land in peace. It is quite unlikely that either of these set up any right to exclusive possession of the land, since the state of tribal jealousy and of constant war and animosity which has long been the normal condition of the New Zealanders, especially of those tribes which are closely connected by blood, does not seem then to have commenced.

It is clear that many of the traditions relied on to establish these ancient claims, are much more recent than the events they profess to record; there is much to show that here, as in our own and other countries, names have been given to places and objects, and then traditions have grown up professing to account for these names: thus the point at Maketu has been called Te Maraetanga o Te Ihu o Tamatekapua, and this has become the basis of a claim, and is cited as a proof that the land belonged to Tamatekapua; and because Lake Rotorua has been called "Rotorua nui a Kaha," therefore it is asserted that it must have belonged to Kaha, though it is usually believed that he and his son lived and died at Maketu.

Rangitihi, who was fifth in descent from Tamatekapua, is admitted

to have gone inland to Pakotore, and to have died there; and, after his time, his descendants seem all to have migrated to the Lakes, a few miles further.

About five generations later, it is admitted that Ruangutu occupied Maketu and the lands in question, of which it is naturally the key; and there is no doubt that Ruangutu was a descendant of Tapuika.

Since the judgment given by the Court at Tauranga in favour of the Tapuika tribe, the Ngatitunohopu, one of the hapus of the Ngatiwhakaue tribe, have set up a pedigree for Ruangutu's wife, Pare, by which they pretend to shew that she was descended from Tamatekapua, intending thereby to bring themselves in to a partition of any interest the Tapuika might derive from Tatahau, son of Ruangutu and Pare.

The Court has no difficulty in declaring its belief that this pedigree is spurious, and that Tatahau represented the Tapuika tribe only, his mother having been connected with Waitaha. Happily this is a point of little or no importance in the decision of the case, for it has been shown by witnesses of many different tribes, in other cases as well as in this, many of them most anxious to conceal or extenuate the fact, that the conquest by the Ngatirangihouhiri, which commenced in Tatahau's time, his death and that of many of his family having been its first stage, was complete over the open lands, from Whakatane to the North of Tauranga, and that their "mana" remained firmly established over the whole of these lands for many generations.

The various tribes descended from the Arawa immigrants especially those from Rangitihi, who were formerly called "Ngaoho," but who are now best known as the "Arawa," seem to have fought with the invaders on the land now under investigation for a long time, and to have obtained "utu" for their constant defeats by occasional reprisals; but the whole assembled tribes were so utterly defeated in two successive battles at or near Kawa on this claim, that at length a peace ensued, based on an entire abandonment of the open lands to the Ngatirangihouhiri.

Tapuika have asserted that after the first fights with the Ngatirangihouhiri, they became closely allied with them by intermarriages, and that they continued to occupy the Maketu lands. The fact is probable enough, but it would only show that their ancestors had acquiesced in the conquest, had given up the original title to their lands, and lived under the "mana" of the powerful invaders; and it is pretty clear that even then Rangiuru was their ordinary residence, and that they were effectually driven back from the Maketu side of the Kaituna River by the last swarm of the Ngatiawa immigrants, the Ngatiwhakahinga.

Thus all the ancestral titles over these lands, derived from the *first comers in the* Arawa canoe, were effectually swept away, and *for many generations* no one could have pretended to set up a *claim, except under* Ngatirangihouhiri, until an entirely new order of

things was originated by the incursions which the Ngapuhi tribes were enabled to make through their exclusive possession of fire-arms.

As soon as the first murderous onslaughts were over, the whole of the Arawa tribes seem to have been impressed with the necessity of suspending the jealousies which had kept them in a state of constant internal warfare, and of uniting to obtain firearms to prevent the repetition of the attack from the North. A position on the sea-coast was necessary to enable them to effect this.

Some alliances had been made by individual chiefs through intermarriage with the Ngatirangihouhiri, now known as Ngaiterangi, and having their chief settlements at Tauranga, and also with the Ngapuhi. Advantage was taken of these to obtain—by a deputation sent to the latter at the Bay of Islands—the advent of an European trader, Tapsell, from whom arms could be purchased: and from the former, permission for Tapsell to live at Maketu, and for the Arawa to dress flax in the swamps around it and on the banks of the rivers. This singular concession was made through Hori Tupaea, a Ngaiterangi chief still living, and who was present in the Court. He came to Maketu with an overwhelming force to assert his rights on Tapsell's arrival, and a very large payment was made to him by Tapsell for the privileges granted. The Ngatiwhakaue tribe were the chief movers in this affair, and they now try to magnify the transaction into an absolute sale of Maketu and all this land to them. It is obvious that such a sale was a thing quite unknown and unheard of in those times, and that it should have taken place is quite incredible; but even if it had been made, it was at all events very soon cancelled by the means, then much better understood as conferring rights to land, of irresistible force and the destruction of the purchasers and occupants.

In virtue of this concession by Ngaiterangi, the whole of the Arawa tribes, namely, Ngatiwhakaue, Ngatipikiao, Ngatitarawhai, Ngatitunohopu, Ngatirangiwewehi, Ngatirangiteaorere, Tuhourangi, and some others living with them, as Ngatiwhakahemo, Ngatipukenga, and Ngatipukeko, then set to work with characteristic energy to scrape flax to pay for the indispensable arms. To do this, the different hapus located themselves wherever they found most convenient around Maketu, with no regard to any ancestral or traditionary claims, and with no dispute, certainly without any remonstrance from Tupuika.

So matters remained until the well-known murder of Te Hunga, a relation of the formidable Ngatihaua warrior, Te Waharoa, which was committed by Haerehuka for the express purpose of involving his tribe in a desperate war. Te Waharoa immediately called on Ngaiterangi to assist him, and with them marched along the beach from Tauranga in great force, massacreing a party of Tapuika whom he met on his way, because of their hereditary connection with the Arawa tribes, though for many generations they seem to have had little communication with them, stormed the Maketu pa, killed the considerable chiefs together with all the people—chiefly Ngati-

whakaue and Ngatipukenga—who were in it, burnt the pa, together with Tapsell's house and store, and returned by the same way they had come.

The Arawa tribes speedily mustered to avenge this terrible blow, and their vengeance fell, not on Te Waharoa, who had inflicted the injury, but on his allies the Ngaiterangi. With characteristic imprudence, the Ngaiterangi held in quite insufficient force a very large pa at Te Tumu, a most indefensible spot near Maketu. It was stormed by all the Arawa, except the Ngatipikiao and a small part of Ngatiwhakaue, who happened to come up just too late. Ngatiwhakaue—a name which includes many important hapus—were very prominent in this expedition and in the assault, but all the associated tribes took part, including a small number of the Tapuika, who seem now for the first time to have joined the Arawa, no doubt in consequence of the death of their kinsmen at the hands of Te Waharoa.

After the fight, the Ngatirangiwewehi and Ngatirangiteaorere made a claim to the land by setting up "rahui" on the right bank of the Kaituna river, which seem to have been maintained for about two years, and then to have been thrown down by the Ngatitunohopu. The other tribes, also, seem to have seized as their own some pieces near Kawa and elsewhere, but they all returned to their settlements on the Lakes, where the war was still going on, and they do not seem to have thought of venturing to live permanently on any of the Maketu lands in defiance of the still formidable "mana" of Ngaiterangi and Waikato, until the Ngatipikiao made up a party from all the tribes they could induce to accompany them, and took the bold and decisive step of occupying Maketu in force.

Tapuika, it is clear, never ventured to make any objection to the occupation of the Maketu lands, or to set up any claim for themselves either on the first flax-dressing occupation or on the Ngatipikiao advance, nor is it conceivable that such a claim would have been listened to, or that its assertion would have been safe. It is true that after the final re-conquest—which was not completed until after several years more of desultory and intermittent warfare—the tribes in general settled down on the places with which their ancestors were connected by tradition, and that this was very generally assented to tacitly by the tribes, so that in investigating the titles to lands around and at some distance from Maketu, it is commonly necessary to look closely into the ancestral title; but this is generally for the purpose of adjusting disputes between closely-allied hapus, and nothing is more clear than that such rights derive their value wholly from the conquest, and from the resuscitation of them by the tacit consent of the conquerors. But it is utterly incredible that the whole of the allied tribes conquering the invaders of this great territory, after a long series of warfare, with immense losses of leading chiefs killed, and so recovering the lands connected with all their earliest traditions, should then give up the whole fruits of their conquest to a small tribe which had never assisted them,

except at the very last, and for no other reason than that ten generations before, their ancestors had been left in sole occupation of it. The conquerors cannot be shown to have ever thought of such a romantic generosity. The claim of Tapuika to Maketu itself is at least as good as that to Paengaroa; but Ngatipikiao and others have always occupied it without the smallest reference to such a claim. The lands immediately round it were seized by individual chiefs as they required them for cultivation, and not unfrequently they quarrelled for their possession. But the first suggestion of a claim by Tapuika seems to have been at the time of the purchase of Wharekahu by Dr. Shortland, in 1843 or 1844, when Te Koata made a claim for a share in the horses given for the purchase; but even then it is not shown that he made the claim as a Tapuika chief, but it rather appears that he must have claimed only under his Tuhourangi descent, since he seems to have limited his claim to one horse, and it is doubtful if he even got that, while the Tapuika claim, as now set up under the shadow of the law, would extend to an absolute and exclusive right to the whole.

But the function of the Native Land Court is to ascertain who were the absolute masterful owners of the land at the time of the advent of the British Government, and the persons to whom those rights have now descended. It is certain that Tapuika were not in that position, that they neither held the land in visible occupation nor had any rights to which the occupants would then have assented. So far from that, it has been asserted that one of the conquering tribes, the Ngatirangiwewehi, shortly after the conquest at Te Tumu, actually suggested to their enemies, the Ngaiterangi, that they should obtain "utu" by destroying the Tapuika on their undoubted ancestral lands, Rangiuru, and that, from fear of treachery by the Arawa tribes, they last retreated for safety to Rotorua, where they stayed for some two years.

The Court, therefore, can have no hesitation in adjudging that the Tapuika have no rights whatever as a tribe, on Paengaroa.

There seems no reason to doubt that some of the descendants of Rangitihi, the Ngatitutea, have always been recognised as the owners of that portion of the block which lies to the South of Pakotore. These lands being near to the forest and to the permanent settlements of Ngatitutea at Rotoiti, their occupation, occasional at least, even in Ngatirangihouhiri times, is not improbable.

The title of the descendants of Tutea to that piece will therefore be affirmed by the Court, but the larger portion of the block, to the North, must be adjudged to all the conquorers at the storming of Te Tumu. The taking of that pa completed the re-conquest of these lands on the flat behind it, and made the re-occupation of Maketu feasible.

This occupation of Maketu, headed by Ngatipikiao, was no doubt one of the most important incidents in the long course of the re-conquest, and the title of that tribe and its allies to the great bulk of the land *East of the* Kaikokopu, which the Court has recently co

firmed, was the reward of that well-timed and daring movement; but it is unreasonable to stretch that exploit into an occupation of the whole territory, and to attempt to exclude the Ngatiwhakaue and their allies from the portion which they took by an act even more daring and successful.

The judgment of the Court is that a Certificate of Title will be issued in favor of such persons, not exceeding ten, as the members of the Ngatitutea hapu may agree upon, for that portion of the Paengaroa Claim, which lies South of a line from Korakonui to Karikari.

And that a Certificate of Title to the remainder of the Block will be made to persons similarly agreed on by the Ngatiwhakaue, Ngatitunohopu, Ngatirangiwewehi, Ngatirangiteaorere, Tuhourangi, and their associated hapus. And in both cases, if desired by the claimants, the names of the individuals entitled, as members of these tribes, can be registered as owners under the 17th section of the Native Land Act 1867.

NATIVE LAND COURT.

GISBORNE, July 2nd, 1875.

JOHN ROGAN, ESQ., *Judge*; HONE PEETI, *Assessor*; and WIKIRIWHI TE TUAHU, *Assessor*.

WAIKANAE AND AWAPUNI.

BOUNDED on the North and North East by the Waikanae and Turanganui rivers; on the South by the sea (Poverty Bay); on the South West by the Awapuni Lake, and a straight line from Te Kuwha to Te Wharau-a-Ruakore; and on the North West by a survey line to the Waikanae river, which line forms a part of the boundary of Matawhero No. 1.

The history of the first occupation of this place is very clearly related by the first claimants, Rutene Te Eke, Hare Wahie, Wi Pere, and others. It appears that the original proprietor (judging from the tradition given by the claimants and counter-claimants) was a chief named Kiwi Ruapani, who lived about 400 years ago. Little or nothing is known of the people who occupied the district for nearly 200 years after Ruapani. The next person who appears as chief proprietor is Te Nonoi, from whom all the present claimants and counter-claimants—233 in number—have traced their descent. Rutene and his people, in number forty-four, claim through Kahunoke, elder brother of Te Nonoi, and also from his sister, as is shown in the genealogical table. They base their claim also on occupancy of the land, which has not been proved beyond the fact that the Waikanae river was used by the whole of the tribe called Itangaamahaki for catching eels; and Te Wai-o-Hiharore, which is a mere water-hole inland of the beach, and which has been much disputed on all sides, is acknowledged to have been the fishing-ground of the tribe for generations past during war time, when food was difficult to be obtained. The men cast their nets into the sea, and made weirs for trapping eels in the stream Waikanae, while the women at low tide gathered pipis in the rivers.

From these facts, it is argued by Rutene, for the tribe, that these two blocks of land should form a tribal estate.

The history of the wars which were carried on by these people's forefathers, extending into the interior and as far as Opotiki, was minutely detailed by Wi Pere. It represented the society in the country at that time in a frightful state of anarchy and confusion. It is not necessary in these cases to dwell further on the wars of the district, and it is hardly necessary to say that the original cause of the quarrels was a woman.

Riparata has shown continuous occupation from the time of her ancestor Te Maanga, who was left in charge of the land after the "rahui" was put up at the mouth of the Waikanae river; her grandfather and father have exercised rights of ownership, and her people to this day continue to do so, their place of abode or "kainga" being contiguous to this place, and only separated from it by the stream, and a Crown Grant having been issued to her and her relations by the Commission Court for the block known as Waikanae proper.

AWAPUNI.

Riparata Kahutia and Hapi Kiniha are the claimants to this block, which contains 370 acres. Evidence was given by Hapi Kiniha at a former sitting of this Court, which has been read over and acknowledged by him to be correct, and to which he stated he had little or nothing to add. The evidence of Riparata, which was taken at length in the Wai-o-Hiharore case, equally applied to this, and it was agreed that that evidence should be adopted by the Court.

This claim is opposed by a section of the Rongowhakaata tribe called Ngatimaru, who base their claim on ancestry and occupation. Hoani Ruru conducted the claim of this sub-tribe.

Hirini Haereone, Paora Matuakore, and Wi Pere prefer claims to a portion shown on the map produced in Court by Paora.

Pimia Aata and Tamati and their party also claim through ancestry and occupation, and Tamati has pointed out on the ground one or two places which have been occupied by him for the purpose of fishing, on the Awapuni Lake.

With regard to the claim set up by Ngatimaru to this block, it has been proved to the entire satisfaction of the Court that these people have occupied land adjacent thereto, and if at any time heretofore they may have encroached on the fishing ground (which was then the only occupation that is attempted to be proved), they were driven off generations ago by the forefathers of the present claimants, and have never attempted to occupy since. This claim of Ngatimaru is considered extinguished; it has long ago become "cold" (*mataotao*), and is dismissed accordingly.

The portion of this block claimed by Hirini Haereone, through his mother, Harata, who gave this land over to Paratene some years ago, by whom it was ceded to Mr. Donald McLean with other land as a peace offering for the offence of the Hauhaus, has been returned to the natives by the Native Minister during his late visit to Poverty Bay. Riparata having in her evidence admitted Hirini Haereone as "te tangata o te whenua," while he took no exception to Paora Matuakore as the owner of the land, Paora and their party are admitted as owners of this block. The other portion of the Awapuni *block contiguous to* Wai-o-Hiharore is admitted to be the property *of Riparata, Hapi* Kiniha, and their co-claimants, together with *Pimia Aata and Tamati,* and those who claim with them.

The decision of the Court in the case of Wai-o-Hiharore, the investigation of which has occupied so many days, is in favour of Riparata and her relatives. In expressing this view of her claim over Te Wai-o-Hiharore, regard has been had to the evidence given by Rutene, namely, that at the time Ihu came and erected eel *pas* on the Waikanae stream, Riparata's ancestor, Te Maanga, destroyed them. No one interfered to dispossess him, and those who came after him, to the present time. With reference to the question of tribal right over this land, and with regard to the evidence adduced on both sides as to the Wai-o-Hiharore being a fishing station used by the whole of the Itangaamahaki tribe for generations, the Court orders that ten acres of land situated at the spring on the block from whence it derives its name, and ten acres adjoining on the Awapuni block, be surveyed and set apart as an inalienable reserve for a fishing station, in the Memorial of Ownership for which the the names of Riparata, Rutene Te Eke, Wi Pere, Pimia Aata, Paora Matuakore, and all the claimants, be inserted.

One hundred and fifty years ago, Te Konotu put up a "rahui" (mark) on the Wai-o-Hiharore block, which was protected by Riparata's forefather, Te Maanga. The Native Land Court now sets up a land mark at the spring for the purpose of securing to the descendants of the present generation the privilege of coming from the interior to the beach, and of exercising the rights of their forefathers by occupying this favourite fishing ground.

The Court is of opinion that the shares in this and the Wai-o-Hiharore blocks are unequal.

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